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ALEXANDER L. STEVAS,
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1982

WILLIAM H. JOINER, JR.,
Petitioner

v.

KAREN H. VASQUEZ,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TEXAS
FOR THE FIFTH SUPREME JUDICIAL DISTRICT

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QUESTION PRESENTED

Whether the judgment of the Court of Appeals of Texas for the Fifth Supreme Judicial District is consistent with the Due•Process Clause of the Fourteenth Amendment to the United States Constitution in view of the fact that through its imposition of the doctrine of res judicata to bar petitioner's present bill of review proceeding it validates a default decree terminating Petitioner's parental rights which is demonstrably constitutionally invalid for want of adequate notice and the merits of the grounds for termination have never actually been adjudicated in an adversary proceeding in which petitioner has appeared.

LIST OF PARTIES

William H. Joiner, Jr. (Petitioner)

Karen H. Vasquez (Respondent)

Rebecca Leigh Joiner (Children of

and • Petitioner

William Bartley Joiner and Respondent
parties in the
district court,
but not in the
court of appeals)

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OPINIONS BELOW

The opinions of the Court of Appeals of Texas for the Fifth Supreme Judicial District and the dissenting opinions (beginning at P. App.¹ A1) are reported at 632 S.W. 2d 755 (Tex. App. - Dallas 1982).

JURISDICTION

The judgment of the Court of Appeals of Texas for the Fifth Supreme Judicial District (P. App. A65) was entered on December 11, 1981. The petitioner's motion for rehearing was overruled by

¹"P. App." refers to the appendix to this petition.

order of the Court of Appeals of Texas for the Fifth Supreme Judicial District (P. App. A67) on March 17, 1982. The petitioner's second amended motion for rehearing was overruled by order of the Court of Appeals of Texas for the Fifth Supreme Judicial District (P. App. A69) April 30, 1982.

The petitioner's application for writ of error was refused as presenting notation no reversible error by order of the Supreme Court of Texas (P. App. A70) on January 29, 1983. The petitioner's motion for rehearing was overruled by order of the Supreme Court of Texas (P. App. A72) on March 9, 1983.

The jurisdiction of this Court is invoked under 28. U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision

involved, U.S. Const. Amend. XIV, §1,

provides in pertinent part:

. . .nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

STATEMENT OF CASE

On February 11, 1976, respondent, Petitioner's ex-wife, then known as Karen Stephens, filed an original petition in cause number 76-165-JUV in a juvenile court of Dallas County, Texas, to terminate petitioner's parental rights as to his children by her, Rebecca Leigh Joiner and William Bartley Joiner, (Court of appeals opinion, P. App. A2.) Personal service was attempted on petitioner and, thereafter, notice was undertaken through publication, and an attorney ad litem was appointed to represent petitioner. (Court of appeals opinion, P. App. A2.) On June 3, 1976, the juvenile court entered a default decree in cause number 76-165-JUV terminating petitioner's parental rights as to both children. (Court of appeals

opinion, P. App. A2-3) On February 24, 1977, petitioner filed a motion for bill of review in cause Number 77-161-JUV in the same juvenile court of Dallas County, Texas, which was presided over by a new judge, to set aside the decree of termination. (Court of appeals opinion, P. App. A3.) However, the juvenile court erroneously imposed on petitioner the traditional requirement of a bill of review proper that he establish a meritorious defense to the grounds for termination. (Court of appeals opinion, P. App. A 9. Dissenting opinion per Akin, J., P. App. A32. B.R.1-S.F.² 60-61).

Counsel for petitioner was, not unjustifiably, unprepared to present such a meritorious defense at that particular time. (B.R.1-S.F. 60-61.) As a result,

²"B.R.1-S.F." refers to the statement of facts in cause number 77-161-JUV, petitioner's first bill of review proceeding.

on September 22, 1977, the juvenile court denied petitioner's motion for bill of review in cause number 77-161-JUV. (Court of appeals opinion, P. App. A4. B.R.1-SF 60-61).

* Counsel for petitioner failed to file an appeal from the denial of the motion for bill of review in cause number 77-161-JUV. (Court of appeals opinion, P. App. A4.) Instead, on September 27, 1977, petitioner filed a second bill of review in cause number 77-855-W in a district court of Dallas County, Texas, to set aside the decree of termination. (Court of appeals opinion, P. App. A4.) On March 7, 1978, the district court denied petitioner's motion for bill of review in cause number 77-855-W upon respondent's plea of res judicata. (Court of appeals opinion, P. App. A4.) Once again counsel for petitioner failed to file an appeal from

the denial of the motion for bill of review in casue number 77-855-W. (Court of appeals opinion, P. App. A4.)

On January 3, 1980, petitioner having obtained new counsel, filed a third petition for bill of review in cause number 80-7-W in the District Court of Dallas County, Texas, for the 304th Judicial District to set aside the decree of termination. (Court of appeals opinion, P. App. A4.) On March 21, 1980, petitioner filed in cause number 80-7-W his first amended petition for bill of review (P. App. A73.) Petitioner alleged therein that the termination decree was void because the juvenile court lacked jurisdiction over him to render the decree since he had not received adequate notice of the termination proceeding against him as required by the due process clause of the Fourteenth Amendment to the United State

Constitution. (P. App. A76-84). On April 14, 1980, the district court denied petitioner's petition for bill of review in cause number 80-7-W. (P. App. A97-98) upon respondent's plea of res judicata (P. App. A94-96). Petitioner filed a motion for rehearing (P. App. A99-100), which the district court denied on May 14, 1980 (P. App. A101.)

Petitioner appealed to the Court of Appeals of Texas for the Fifth Supreme Judicial District. Petitioner specifically argued on appeal that the termination decree was void because the juvenile court lacked jurisdiction over him to render the decree since he had not received adequate notice of the termination proceeding against him as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (Brief for Appellant, P. App. A102-18.)

The court of appeals sidestepped this contention and affirmed the judgment of the district court in cause number 80-7-W on the ground that:

[T]he plea of res judicata was properly sustained because the judgment denying the first bill of review is conclusive on the issue of the court's jurisdiction in the termination suit. The first bill of review was a direct attack; and might properly have been considered as a motion new trial within rule 329, to which the strict requirements of a bill of review did not apply, because citation was served by publication and the bill of review was filed within two years. Nevertheless, a direct attack was made, the jurisdiction of the juvenile court in the termination proceeding was put in issue, relief was denied, and Joiner did not appeal. That judgment bars the present bill of review under the well-settled rule that a party is bound by a adjudication of the court's jurisdiction in a contested proceeding.

. . . .
Under these well-established rules, even though the original termination decree may be void - or more properly, voidable - in the sense that it was rendered without valid service of process, the judgment in the first bill of review is valid and stands as a bar to the present bill of review.

. . . [Joiner's] right to attack the termination decree died with his

failure to appeal from the denial of his first bill of review.

(Court of appeals opinion, P. App. 9-11 (citations omitted).)

The court of appeals concluded that imposition of the doctrine of res judicata to bar petitioner's present bill of review was justified by the public policy that "there must be an end to litigation" and that the disturbing influence of multiple lawsuits upon the environment of young children must be discouraged. (Court of appeals opinion, P. App. A 10, 13-15) on December 11, 1981, the court of appeals rendered judgment affirming the judgment of the district court in cause number 80-7-W. (P. App. A65.)

On rehearing petitioner specifically argued: "Texas public policy does not override the Fourteenth Amendment of the United States Consitution. This reasoning is particularly compelling in this case because it cannot be doubted

that the integrity of the family unit has found protection the the Due Process Clause of the Fourteenth Amendment."

(Appellant's Motion for rehearing P. App. A119-22 (citation omitted).) On March

17, 1982, the court of appeals overruled petitioner's motion for rehearing. (P.

App. A67-68.) On further rehearing petitioner specifically advanced the same argument once again. (Appellant's second amended motion for rehearing, P. App.

A123-27.) On April 30, 1982, the court of appeals overruled petitioner's second amended motion for rehearing (P. App.

A69.) Petitioner then applied for writ of error to the Texas Supreme Court. In his application for writ of error

petitioner again specifically attacked the judgments of the court of appeals on the ground that: "Texas public policy

does not override the Fourteenth Amendment of the United States

Constitution. This reasoning

is particularly compelling in this case because it cannot be doubted that the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment." (Petitioner's application for writ of error, P. App. A128-32.) On January 29, 1983, the Supreme Court refused petitioner's application for writ of error as presenting no reversible error. (P. App. A70-71.) On March 9, 1983, the supreme court overruled petitioner's motion for rehearing. (P. App. A72.)

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals of Texas for the Fifth Supreme Judicial District has effectively decided a highly significant question of federal constitutional law that has not been, but should be, settled by this Court.

The termination of petitioner's parental rights involved the termination of an interest in liberty deemed fundamental under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. This Court has recently reiterated "this Court's historical recognition tht freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." Santosky v. Kramer, 455 U.S. 745, 753 (1982).

Petitioner was entitled under the Due Process Clause of the Fourteenth Amendment to adequate notice of the termination proceeding against him. In a prior case involving termination of parental rights this Court held:

It is clear that failure to give petitioner notice of the pending adoption [and corresponding termination] proceedings violated the most rudimentary demands of due process of law. 'Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' 'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'

Armstrong v. Manzo, 380 U.S. 545, 550

(1965) (quoting Mullane v. Central

Hanover Bank and Trust Co., 339 U.S. 306,

313-14 (1950)) (citations in both

opinions omitted).

Petitioner was further entitled under the Due Process Clause of the Fourteenth Amendment to be heard on the merits in the termination proceeding. As this Court has clearly held innumerable times: "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). In a more recent case, involving termination of parental rights, this Court held:

The State's interest in caring for Stanley's children [effectuated by terminating his parental rights] is de minimus if Stanley is shown to be a fit father. It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.

Stanley v. Illinois, 405 U.S. 645, 657-58 (1972). There is no real distinction in this regard between cases involving

termination of parental rights through action of state agencies and those involving termination through action of private litigants, as in the case at bar. See Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

Petitioner has alleged in his present petition for bill of review (P. App. A76-84), and the record will fully substantiate upon remand for trial, that he was denied his basic right under the Due Process Clause of the Fourteenth Amendment to adequate notice of the termination proceeding against him in that:

Petitioner was a nonresident of Texas at the time the termination proceeding was instituted against him. Personal service of citation upon him was attempted (pursuant to Tex. R. Civ. P. 108) by forwarding citation to the Sheriff of Oklahoma County, Oklahoma, who

was to execute service. The sheriff's return of the unexecuted citation indicates only that he was unable to contact petitioner and did not indicate (as required under Tex. R. Civ. P. 107 (Vernon 1967)) the diligence, if any, exercised by the sheriff in attempting to execute service.

As a result, petitioner was improperly cited to appear in the termination proceeding solely by means of publication (under Tex. Fam. Code Ann. §11.09(d) (Vernon Supp. 1982-83)). Not surprisingly, petitioner consequently received no notice whatsoever of the termination proceeding. This was compounded by the failure of the judge of the juvenile court in the termination proceeding to comply with her duty (under Tex. R. Civ. P. 109) to inquire into the sufficiency of the diligence exercised in attempting nonresident personal service

on petitioner. This was further compounded by the failure of the guardian ad litem appointed by the court to represent petitioner to challenge the sufficiency of the procedure employed to attempt nonresident service of citation upon petitioner.

Further, respondent knew the whereabouts of petitioner's parents and sister. It follows that substitute service on any of them (under Tex. R. Civ. P. 109a) rather than citation by publication, was the method reasonably calculated under the circumstances to apprise petitioner of the termination proceeding against him. Petitioner's receipt of no notice of that proceeding was compounded by the failure of the guardian ad litem appointed to represent him to: (1) cross examine respondent as to her efforts to locate petitioner and (2) locate petitioner himself when he

could have done so easily by contacting petitioner's parents or sister.

The facts fully establish that petitioner was denied his minimum right under the Due Process Clause of the Fourteenth Amendment to receive "notice reasonably calculated, under all the circumstances," to apprise him of the termination proceeding against him, as mandated by this court in Armstrong v. Manzo, 380 U.S. 545, 550 (1965), and Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313-14 (1950). Further, this court has clearly indicated that persons, such as petitioner, faced with the termination of their fundamental parental rights are entitled to an even higher standard of protection under the Due Process Clause:

Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights

have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.

Santosky v. Kramer, 455 U.S. 745, 753 (1982).

• In essence petitioner has alleged in his present petition for bill of review, and the record will fully substantiate upon remand for trial, that the denial of his right under the Due Process Clause of the Fourteenth Amendment to adequate notice of the termination proceeding against him effectively resulted in the denial of his right under the Due Process Clause to be heard on the merits in the termination proceeding. Specifically, petitioner has alleged in his present petition for bill of review (P. App. A87-89), and the record will fully substantiate upon remand for trial, that the guardian ad litem who was appointed by the court to represent petitioner in the termination proceeding - as a result

of his failure to appear due to his having received no notice of the proceeding - wholly failed to represent petitioner effectively in that: (1) He failed to file an answer on behalf of petitioner.

(2) He failed to cross-examine respondent as to her allegations for terminating petitioner's parental rights.

(3) He failed to request the filing of a statement of evidence prior to entry of the decree of termination (required under Tex. R. Civ. P. 244, 812).

(4) He failed to object to rendition of a default judgment (defined under Tex. R. Civ. P. 239 as a judgment rendered in the absense of an answer - the mere appearance of a guardian ad litem is not an answer, Brown v. Brown, 521 S.W.2d 730 (Tex. Civ. App. - Houston [14th Dist.] 1975, no writ)) against petitioner

(prohibited by Tex. R. Civ. P. 812 when nonresidents are cited by publications).

(5) He failed to object to rendition of the decree of termination to the extent that it was predicated on the ground of failure to provide child support for William Bartley Joiner in view of the fact that the judge of the juvenile court had previously advised counsel that she would not terminate petitioner's parental rights on that ground.

(6) He failed to object to rendition of the decree of termination to the extent that it was predicated on the ground that petitioner had placed William Bartley Joiner in conditions endangering him, in support of which ground no evidence was introduced.

Since petitioner was not notified of the termination proceeding against him, he was deprived of his right to present the facts refuting respondent's grounds

for termination, which facts he is fully capable of proving. He was also deprived of his right to present any defense to those grounds which he might have.

These facts fully establish that because petitioner was denied his right under the Due Process Clause of the Fourteenth Amendment to adequate notice of the termination proceeding against him he was also effectively denied his right under the Due Process Clause to be heard on the merits in the termination proceeding, in contravention of the mandates of Stanley v. Illinois, 405 U.S. 645, 657-58 (1972), Armstrong v. Manzo, 380 U.S. 545, 552 (1965), and Grannis v. Ordean, 234 U.S. 385, 394 (1914). The appointment of the guardian ad litem to represent petitioner in the termination proceeding against him was no substitute for adequate notice of the proceeding. Even petitioner's appearance pro se in

the proceeding would have been better than the appointment of the guardian ad litem; at least in that event petitioner could have made some defense on the merits. Thus, this Court's holding in Lassiter v. Department of Social Services, 452 U.S. 18 (1981) - that an indigent defendant in an action to terminate parental rights is not necessarily entitled to appointed counsel - has no application in the case at bar. Simply put, the effective denial of petitioner's right to be heard on the merits in the termination proceeding, resulting from the denial of his right to adequate notice of that proceeding, wholly fails to comport with the heightened standards of due process held by this Court to be accorded parents threatened with termination of their fundamental parental rights:

Even when blood relationships are strained, parents retain a vital

interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.

Santosky v. Kramer, 455 U.S. 745, 753 (1982).

The failure of petitioner's first attack on the decree of termination was the result of inextricably intertwined procedural errors on the part of the juvenile court and petitioner's prior counsel. It is beyond dispute that the juvenile court in petitioner's first bill of review proceeding should have treated the motion for bill of review as a motion for new trial under rule 329 of the Texas Rules of Civil Procedure. Brown v. Breneman, 385 S.W.2d 461 (Tex. Civ. App. - Dallas 1964, no writ). That rule, as it was in force at the time, provided in pertinent part:

In cases in which judgment has been rendered on service of process

by publication, where the defendant has not appeared in person or by attorney of his own selection:

(a) The court may grant a new trial upon petition of the defenant showing good cause, supported by affidavit, filed within two years after such judgment was rendered

Tex. R. Civ. P. 329 (Vernon 1977). There is also no dispute that the court should have granted petitioner's motion under this standard.

Instead of corectly following Brown v. Breneman, the juvenile court erroneously treated petitioner's motion as one for a bill of review proper and correspondingly imposed on petitioner the requirement (set forth in Alexander v. Hagedorn, 148 Tex. 565, 226 S.W.2d 996 (1950)) that he establish a meritorius defense to the grounds for termination before the decree of termination could be set aside. (B.R.1-S.F. 60-61.) Furthermore, the court ignored the holding in Gunn v. Cavanaugh, 391 S.W.2d 723 (1965), that when a petition is in

the nature of a bill of review as to a judgment terminating parental rights, the burden of proof on the merits of the grounds for termination rests not on the petitioner, but on the opposing party. Accord Leithold v. Plass, 488 S.W.2d 159 (Tex. Civ. App. - Houston [14th Dist.] 1972, no writ). Of far more significance, however, the juvenile court also ignored this Court's holding in Armstrong v. Manzo, 380 U.S. 545 (1965), that the Due Process Clause of the Fourteenth Amendment renders unnecessary the establishment of a meritorious defense to grounds of termination of parental rights in an attack in a Texas court on the termination decree of a Texas court when the parent whose rights were terminated did not have notice of the termination proceeding. As a result of these procedural errors, the juvenile court denied petitioner's first motion

for bill of review, since counsel for petitioner was, not unjustifiably, unprepared to present a meritorious defense to the grounds for termination at that particular time. (B.R. 1-S.F. 60-61.º) This error was, in turn, compounded by the procedural errors of petitioner's counsel in: (1) not calling the juvenile court's errors to its attention and (2) not filing an appeal from the court's clearly erroneous judgment.

The inextricably intertwined procedural errors on the part of the juvenile court and prior counsel for petitioner leading to the final judgment denying petitioner's first motion for bill of review thus perpetuated the denial of petitioner's rights under the Due Process Clause of the Fourteenth Amendment to adequate notice of the termination proceeding and to a hearing on the merits of the grounds for

termination. The juvenile court's denial of relief to petitioner is even more outrageous in view of the court's finding that respondent had perpetrated a fraud on the court in the termination proceeding (B.R.1 - S.F. 61) and that the record in the termination proceeding was "probably the worst record of any termination case [the court] had ever heard" (B.R.1 - S.F. 59).

The district court's denial of petitioner's second motion for bill of review upon respondent's plea of res judicata likewise served to perpetuate the denial of petitioner's rights under the Due Process Clause of the Fourteenth Amendment to adequate notice of the termination proceeding and to a hearing on the merits of the grounds for termination.

It is to be emphasized that through gross disregard by the courts for

petitioner's constitutional right to due process of law and through inextricably intertwined procedural errors on the part of the juvenile court and prior counsel for petitioner, the merits of the grounds for termination of petitioner's parental rights have yet to be actually adjudicated in a true adversary proceeding - as opposed to the farce purporting to be a trial in the termination proceeding. Further, the merits of petitioner's claim that his right to due process has been violated have yet to be actually adjudicated other than through preclusion under the doctrine of res judicata.

Whether the judgment of the court of appeals in the instant case barring under the doctrine of res judicata petitioner's collateral attack on the decree terminating his parental rights is violative of petitioner's right to due process of law under the Fourteenth

Amendment, in view of the foregoing facts, turns on a balancing of "three distinct factors" identified in Matthews v. Eldridge, 424 U.S. 319, 335 (1976): (1) the private interest affected by the proceeding; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure. Santosky v. Kramer, 455 U.S. 745, 754 (1982) (citing Lassiter v. Department of Social Services, 452 U.S. 18, 27-31 (1981)).

As to the first of these "three distinct factors" identified in Eldridge, there can be no dispute: "In parental rights termination proceedings, the private interest affected is commanding" Santosky v. Kramer, 455 U.S. 745, 758 (1982).

As to the second "Eldridge" factor, the risk of error created by imposition

of the procedural rule of res judicata in cases such as this is, to use the language of Santosky, "substantial." This is so because the truth of respondent's allegations in support of the decree of termination has yet to be adequately tested in a true adversary proceeding in this matter. The record in the farce that purported to be a trial in the termination proceeding contains no evidence as to at least some of those allegations; as to any others, petitioner can produce refuting evidence or present defenses. In spite of this, petitioner has suffered termination of his "commanding" parental rights as a result of events with respect to which it would be absurd and highly inequitable to hold him responsible: lack of notice adequate to apprise him of the termination proceeding and a combination of inextricably intertwined procedural

errors on the part of the juvenile court and prior counsel for petitioner. Undisputably in this the justice system has so far failed to recognize petitioner's highly "critical need for procedural protections." Santosky v. Kramer, 455 U.S. 745, 753 (1982).

The third "Eldridge" factor involved in the case at bar is the countervailing governmental interest supporting imposition of the doctrine of res judicata. The same court of appeals that has decided the case at bar analyzed in detail the policy considerations underlying the doctrine of res judicata in Gilbert v. Fireside Enterprises, 611 S.W.2d 869, 877-80 (Tex. Civ. App. - Dallas 1980, no writ). In Gilbert the court noted that four policy considerations have been traditionally advanced as underlying the doctrine of res judicata: promotion of judicial

economy, prevention of vexatious litigation, prevention of double recovery and promotion of the stability of decisions. Id. at 877. In this connection, the court quoted with approval, id., the following statement by Professor Cleary:

Courts exist for the purpose of trying lawsuits. If the courts are too busy to decide cases fairly and on the merits, something is wrong. Decision solely in terms of the convenience of the court approaches the theory that the individual exists for the state. Maintenance of the judicial system is a very minor portion of the cost of government. If the judges are too few to be able to decide cases fairly and on the merits, the public probably can afford to have more judges. The fact that a party may waive the defense of res judicata, as seems to be the general rule, indicates that saving the judge's time is more afterthought than reason.

Cleary, Res Judicata Reexamined, 57 Yale L.J. 340, 348-49 (1948). Thus, promotion of judicial economy is not a sufficiently compelling state interest to warrant imposition of the doctrine of res judicata in the case at bar to cut off

petitioner's "commanding" individual interest in view of the risk of error involved.

As to prevention of "vexatious litigation" - which the court in Gilbert defined as litigation in which a plaintiff attempts to make two lawsuits do the work of one without attempting a double recovery or threatening the stability of a decision, 611 S.W.2d at 877 (citing Cleary, Res Judicata Reexamined, 57 Yale L.J. 340, 346, (1948) - the court in Gilbert concluded: "Application of the doctrine [of res judicata] solely for this reason would be too harsh a penalty under the circumstances; prevention of vexation litigation, as we have defined the term, is simply not a sufficiently compelling consideration to warrant precluding [a] cause of action under res judicata." 611 S.W.2d at 878. In this connection the

court quoted with approval, id. at 877-78, the following observation by Professor Cleary:

[T]he purpose of liberality in joinder rules is the same as the anti-vexatious-limitation purpose of the rule of res judicata, i.e., to encourage litigants to reduce the numerical volume of lawsuits by bringing more disputed matters into the same action. Yet when plaintiff seeks to make two lawsuits do the work of one [without attempting a double recovery or threatening the stability of a decision], the rule of res judicata applies to harsh a penalty (complete loss of plaintiff's right of recovery

Cleary, Res Judicata Reexamined, 57 Yale L.J. 340, 346-47 (1948). In fact, there is a strong policy favoring the vindication of substantive rights over strict enforcement of procedural rules designed merely to expedite litigation. Schopflocher, What Is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?, 21 Ore. L. Rev. 319, 321 (1942). As one court has poignantly noted: "All procedure is merely a

methodical means whereby the court reaches out to restore rights and remedy wrongs; it must never become more important than the purpose which it seeks to accomplish." Clark v. Kirby, 243 N.Y. 295, 153 N.E. 79, 82 (1926). Thus, the prevention of vexatious litigation, as herein defined, is not a sufficiently compelling state interest to warrant imposition of the doctrine of res judicata in the case at bar to cut off petitioner's "commanding" individual interest in view of the risk of error involved.

The court in Gilbert concluded that "the truly legitimate policy considerations underlying the doctrine of res judicata are, in most cases, at least, prevention of double recovery and promotion of stability of decisions." 611 S.W.2d at 878. Because of the subject

matter of the case at bar and because petitioner has consistently been the judgment loser throughout the course of the proceedings under consideration, there is no danger of double recovery in the case at bar. Thus, there remains only the question whether Texas' interest in promoting the stability of the decision or decisions asserted as barring petitioner's present bill of review proceeding is sufficiently compelling to cut off petitioner's "commanding" individual interest in view of the risk of error involved.

Citing Ogletree v. Crates, 363 S.W.2d 431 (Tex. 1963), and Knowles v. Grimes, 437 S.W.2d 816 (Tex. 1969), the author of the court of appeals opinions in the case at bar, Chief Justice Guittard, argued that the "principle of finality of judgments" - i.e., the policy favoring stability of decisions - applies in cases involving termination of

parental rights "with a special force."

(Court of appeals opinion, P. App. A14.)

In support of this contention, he quoted

(court of appeals opinion, P. App. A15.)

the former's holding:

As a matter of public policy there should be a high degree of stability in the home and surroundings of a young child, and, in the absence of materially changed conditions, the disturbing influence of constant re-litigation should be discouraged. Once a final decree of custody is rendered, a subsequent suit to modify or to avoid the judgment should be res judicata of all causes of action which, with diligence, could have been asserted in the suit as a basis for obtaining custody and possession of the child.

Ogletree v. Crates, 363 S.W.2d at 436

(emphasis added). Accord Knowles v.

Grimes, 437 S.W.2d at 817.

However, Chief Justice Guittard's policy analysis in the case at bar is fatally defective. Both Ogletree and Knowles involved not the complete termination of the parental relationship, as in the case at bar, but merely the

determination of child custody rights.

In Ogletree the proceedings terminated by the judgments asserted as bars to further litigation had involved full evidentiary hearings on merits as to the conditions affecting the best interests of the child then existing. In Knowles there is no suggestion that the proceeding terminated by the judgment asserted as a bar to further litigation had not involved a full evidentiary hearing on the merits as to the conditions affecting the best interests of the child then existing. In Ogletree the decrees of custody accorded res judicata effect were not taken by default. In Knowles there is no suggestion that the decree of custody accorded res judicata effect was taken by default. In neither case was there any allegation that the decree or decrees of custody given res judicata effect were constitutionally invalid for want of adequate notice or otherwise.

Thus, Ogletree and Knowles are clearly and convincingly distinguishable from the case at bar, in which: (1) the judgment (in petitioner's first bill of review proceeding, or for that matter the judgment in his second bill of review proceeding) asserted as a bar terminated a proceeding in which there was no full evidentiary hearing on the merits as to the best interests of the children, (2) the decree of termination given res judicata effect (albeit indirectly in that it has been perpetuated by the judgments in petitioner's first two bill of review proceedings) was rendered against petitioner in default, (3) there are substantial allegations that the termination decree given (indirectly) res judicata effect is constitutionally invalid for want of adequate notice and (4) as noted, the complete terminaiton of the parental relationship, as opposed to

the mere determination of child custody rights, is involved.

Accordingly, since Ogletree and Knowles are not "directly in point" with the case at bar - and in fact far from it - they do not reflect a binding determination of Texas policy or state interest applicable in the case at bar, as is clear from the rule in Westinghouse Credit Corp. v. Kownslar, 496 S.W.2d 431, 532 & n.1 (Tex. 1973) - a case Chief Justice Guittard neglected to consider. In fact, another case which Chief Justice Guittard neglected to consider, although it is cited in Knowles, suggests that existing Texas policy is quite different in cases of the type as the one at bar from that enunciated in Ogletree and Knowles. In Mumma v. Aguirre, 364 S.W.2d 220 (Tex. 1963), decided on the same day as Ogletree the Texas Supreme Court, while recognizing that "the law favors a

high degree of stability in a young child's home and surroundings," significantly professed "a logical belief that the ties of the natural relationship of parent and child ordinarily furnish strong assurance of genuine efforts . . . to provide the child with the best care and opportunities possible, and, as well, the best atmosphere for the mental, moral and emotional development of the child."

Id. at 221 omitted language refers to the particular application of this proposition in child custody cases). The effect of a termination decree, as opposed to that of a custody decree, also lends overwhelming force to the argument that Chief Justice Guittard has accorded infinitely more weight in the case at bar to the State's interest in promoting the stability of decisions than it deserves. Subject to any limitations expressed in a custody decree, a possessory conservator

(i.e., a parent not having primary custody of a child) has a number of rights, privileges and duties with respect to his child. Tex. Fam. Code Ann. §14.03 (Vernon 1975 and Supp. 1982-83), §1404 (Vernon Supp. 1982-83). By comparison: "A decree terminating the parent-child relation-ship divests the parent and the child of all legal rights, privileges, duties, and powers, with respect to each other, except that the child retains the right to inherit from and through its divested parent unless the court otherwise provides." Tex. Fam. Code Ann §15.07 (Vernon Supp. 1982-83).

It is therefore highly questionable whether the petitioner has standing to reestablish his parental relationship with his children if the termination decree is allowed to stand. See Tex. Fam. Code Ann. §11.03 (Vernon 1975). By comparison, a custody decree may be

modified. Tex Fam. Code Ann. §14.06 (Supp. 1982-83). In other words, if the doctrine of res judicata is permitted in this case to validate an otherwise constitutionally invalid judgment, petitioner is likely to be left without any remedy. Ogletree and Knowles are thus clearly distinguishable from the case at bar.

The children are also likely to be left without any remedy from irreparable harm, even though they have an even more meritorious case (if it is possible to image one) than petitioner since they were not parties in the first two bill of review proceedings. (See court of appeals opinion, P. App. A18.) Although the court of appeals purported in its opinion not to bind the children by its holding, since they did not appeal in the case at bar (court of appeals opinion, P. App. A18-19), there is

nothing to prevent that court from subsequently applying to defeat a future attempt by them to set aside the termination decree the rule advanced by it that a subsequent judgment not on the merits of the grounds of termination (i.e., the judgment in the present bill of review proceeding, in which the children were parties) validates and gives effect to a constitutionally invalid termination decree. (See dissenting opinion per Akin, J., P. App. A54). Further, must the children suffer the termination of their relationship with their father for an indeterminate number of additional years before the courts sort out their claim - even if they ultimately prevail? And what guarantee is there that the guardian ad litem - even if permitted by the court from which his authority is derived and which has thrice invoked technical rules

to effectively deny these children relief from a judgment supported by a record the court itself has characterized as "probably the worst record of any termination case [the court] had ever seen" (B.R.1 -S.F. 59) - will on his own initiative seek relief for the children? Thus, the case at bar falls squarely within the admonition of Justice Akin - the author of Gilbert and a dissenter in the case at bar - in another case which Chief Justice Guittard neglected to consider, although he had joined in it:

[T]he court's duty to protect the children's interest should not be limited by technical rules. Pertinent facts which may directly affect the interests of the children should be heard and considered by the trial court regardless of the lack of diligence of the parties in their presentation of information to the court.

C- v. C-, 534 S.W.2d 359 (Tex. Civ. App. - Dallas 1976, no writ) (citations omitted).

Given the "commanding interest" of the children and the "substantial" risk of error and irreparable harm to them in permitting the default decree of termination in the case at bar to stand, Texas' purported interest in applying the doctrine of res judicata to render that decree final to effectuate the children's best interests is a patent absurdity. Simply put, measured against the first two "Eldridge" factors, considered from the children's viewpoint, Texas' interest in applying the doctrine of res judicata is not even remotely compelling. Thus, it cannot be considered sufficiently compelling to warrant preclusion of petitioner's present bill of review proceeding.

By ignoring it, the Court of appeals in the case at bar has effectively decided a highly significant question of federal constitutional law:

- Whether a Court, through imposition of the doctrine of res judicata, may, consistent with the Due Process Clause of the Fourteenth Amendment, validate a default decree terminating parental rights which is demonstrably constitutionally invalid for want of adequate notice when the merits of the grounds of termination have never been actually adjudicated in a true adversary proceeding.
-

Petitioner submits that the answer to this question is, contrary to the opinion of the court of appeals, a resounding "no" under an "Eldridge" analysis. This court should grant writ of certiorari in the case at bar, reverse the judgments below, permit petitioner to establish the merits of his constitutional and paternal claims, and put an end to what Justice Akin has accurately characterized as "an appalling miscarriage of justice."³ (Dis-

senting opinion per Akin, J., P. App.

A33.)

³It would be absurd, in view of the minimal interest of the state in imposing the doctrine of res judicata in the case at bar, measured against the other two "Eldridge" factors, to deny the writ on the ground that the judgment imposing doctrine in petitioner's second bill of review proceeding precludes this suit.

B. The Court of Appeals of Texas for the Fifth Supreme Judicial District has effectively decided a question of federal constitutional law in a way that conflicts with a decision of • this Court.

In acting as petitioner has suggested this Court would not be adopting any revolutionary principle of law because

the decision of the court of appeals in the case at bar conflicts with this Court's decision in Armstrong v. Manzo, 380 U.S. 455 (1965). In Armstrong the petitioner suffered a default decree by a Texas Court terminating his parental rights concurrent with the adoption of his child by his ex-wife's second husband. The petitioner had been given no notice of the proceeding, even though

the respondents knew of his whereabouts. Subsequently he brought suit (presumably a bill of review proceeding) in a second Texas court to have the decree set aside. The court granted him an evidentiary hearing, without setting aside the decree, in which he attempted to refute the grounds for termination. However, the court denied the petitioner the relief sought; its judgment was affirmed by the court of civil appeals and the Texas Supreme Court refused his application for writ of error.

On review by writ of certiorari, this Court unanimously held that the failure to give the petitioner notice deprived him of due process of law and that the subsequent evidentiary hearing did not cure the constitutionally invalid termination-adoption decree. 380 U.S. 550-51. Since the court of appeals in the case at bar held that the judgment in

petitioner's first bill of review proceeding bars his present attack on the demonstrably invalid termination decree under consideration, that court has in effect held that the judgment in the first bill of review proceeding cured any constitutional invalidity in the termination decree. (Court of appeals opinion, P. App. A9-12 .) Thus, the decision of the court of appeals in the case at bar conflicts with the decision of this Court in Armstrong.

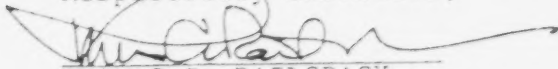
Although Armstrong and the case at bar are factually dissimilar in some respects, the facts in these two cases are strikingly similar. And although it is arguable that Armstrong can be distinguished from the case at bar on the theory that the former involved but one direct attack, while this case involves a collateral attack following a failed direct attack, this is a distinction

without difference. The case at bar and Armstrong are indistinguishable in terms of the basic principle at law involved. If anything, the case of bar calls even more strongly for reversal than Armstrong because in the case at bar the merits of the grounds for termination have never been actually adjudicated in a true adversary proceeding. Thus, the decision of the court of appeals in the case at bar is in conflict with that of this Court in Armstrong, and this Court should therefore grant writ of certiorari.

CONCLUSION

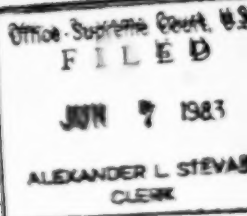
For the foregoing reasons
petitioner requests that the
petition for writ of certiorari
be granted.

Respectfully submitted,



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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1982

WILLIAM H. JOINER, JR.,
Petitioner

v.

KAREN H. VASQUEZ,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TEXAS
FOR THE FIFTH SUPREME JUDICIAL DISTRICT

APPENDIX

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COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

AT DALLAS

NO. 20558

WILLIAM HENRY JOINER, JR.

Appellant

VS.

MRS. KAREN H. VASQUEZ,

Appellee

FROM A DISTRICT COURT
OF DALLAS COUNTY, TEXAS

BEFORE CHIEF JUSTICE GUITTARD AND
AND JUSTICES AKIN AND CARVER
OPINION BY CHIEF JUSTICE GUITTARD
DECEMBER 11, 1981

William Henry Joiner, Jr. appeals
from a denial of his bill of review
attacking a decree terminating his
parental rights in two children. We

affirm because Joiner's present bill of review is barred by a judgment rendered against Joiner in an earlier bill of review alleging similar grounds.

The record reflects that Joiner was married to Karen in 1967 and thereafter two children were born to them while they were residents of the State of Oklahoma. The parties were divorced in 1971 in Oklahoma proceedings, and the children remained in Oklahoma until 1974, when they moved to Texas. In 1976 Karen instituted a proceeding in the juvenile court of Dallas County to terminate Joiner's parental rights. A guardian ad litem was appointed to represent the children's interest. Personal service of process was first attempted upon Joiner and, thereafter, service was undertaken by publication and an attorney ad litem was appointed to represent Joiner. On June 3, 1976, following a trial before

the court, the juvenile court rendered final decree terminating Joiner's parental rights.

On the following February 24, 1977, Joiner filed his first bill of review attacking the termination decree on the grounds that he had a meritorious defense to the grounds alleged in the termination petition, that the record contained no evidence that termination of his parental rights would be in the best interest of the children, that he was not served by personal service and had no knowledge of the suit or the trial, that the appointed attorney ad litem did not contact him, that he was prevented from presenting his meritorious defense without negligence on his part, that the evidence at the trial did not support termination of his parental rights, and that in these respects he was denied his constitutional rights.

The court heard evidence on this first bill of review and denied the relief sought by an order signed September 22, 1977. Joiner did not appeal. Instead, he filed a second bill of review on the same grounds, which the court dismissed on a plea of res judicata. Again, he did not appeal. His present and third bill of review was filed January 3, 1980. In this bill of review he alleges the same grounds as in his first bill of review and other grounds as well. He alleges that citation by publication in the termination suit was improper because the officer's return did not show diligence in attempting personal service, that the appointed attorney ad litem did not provide effective representation, and that the evidence before the court in the earlier suit was insufficient to support termination. He also alleges that section 11.09 of the

Texas Family Code, which authorizes citation by publication to persons who cannot be notified by personal service or registered or certified mail, is unconstitutional because it requires publication only one time. He alleges that the first bill of review was brought within two years, the time permitted by Rule 329 of the Texas Rules of Civil Procedure for a motion for new trial after a judgment is rendered on citation served by publication. He further alleges that the judgment of September 22, 1977, denying his first bill of review, does not bar his present bill of review "because the defense of res judicata is not applicable to jurisdictional questions."

In response to the third bill of review, Karen filed a plea of res judicata based on the judgment denying the first bill of review. At a pretrial

hearing the plea of res judicata was sustained and judgment was rendered that the bill of review "be and the same is denied as a matter of law." The judgment recites that a guardian ad litem appointed by the court appeared and represented the children, but no pleading by him is shown.

Joiner first argues that the trial court was in error in sustaining the plea of res judicata because the facts he pleaded showed that the termination decree was void, and, therefore, the judgment denying the first bill of review could not give the void termination decree any validity or bar his current attack. To support this argument, Joiner relies on judicial expressions, such as those in *Fulton v. Finch*, 162 Tex. 351, 346 S.W.2d 823, 827 (1961), and *Dews v. Floyd*, 413 S.W.2d 800, 804-05 (Tex. Civ. App. - Tyler 1967, no writ), to the

effect that a void judgment is a nullity and may be disregarded anywhere at any time. From this premise, Joiner reasons that a judgment denying a bill of review does not bar a subsequent bill of review if the original judgment is void. Consequently, he insists, no matter how many bills of review may be attempted unsuccessfully, none can result in final disposition of the controversy until the voidness of the original judgment is correctly declared or the rights of third parties have intervened.

This argument is untenable for two reasons. First, the termination decree is not "void" in the sense that that term is used in the cases cited. It is a judgment which the juvenile court had jurisdictional power to render in the sense of jurisdiction over the subject matter. It is alleged to be "void" only because of lack of proper service of

process, that is to say, lack of jurisdiction of the person. Since it reveals no lack of jurisdiction on its face and recites proper service, it is not subject to collateral attack. *Pure Oil Co. v. Reece*, 124 Tex. 476, 78 S.W.2d 932, 934-35 (1935); *Crawford v. McDonald*, 88 Tex. 626, 33 S.W. 325, 328 (1895); *Imatani v. Marmolejo*, 606 S.W.2d 710, 713 (Tex. Civ. App. - Corpus Christi 180, no writ). Such a judgment is subject to attack only by a bill of review in which evidence of lack of service is adduced and a meritorious defense is shown. *Deen v. Kirk*, 508 S.W.2d 70, 72 (Tex. 1974); *McEwen v. Harrison*, 162 Tex. 125, 345 S.W.2d 706, 710 (1961). For example, a divorce decree may be attacked in a bill of review on the ground that the record affirmatively shows that a waiver of process is invalid, but it is not subject to collateral attack on that ground,

since the court had jurisdictional power to determine validity of the waiver and to render the decree. Thus, we cannot agree that a termination decree rendered on defective service by publication is "void" in the sense that it may be disregarded anywhere and at any time. Deen v. Kirk, supra.

Second, the plea of res judicata was properly sustained because the judgment denying the first bill of review is conclusive on the issue of the court's jurisdiction in the termination suit. The first bill of review was a direct attack, and might properly have been considered as a motion for new trial within rule 329, to which the strict requirements of a bill of review did not apply because citation was served by publication and the bill of review was filed within two years. Nevertheless, a direct attack was made, the jurisdiction

of the juvenile court in the termination proceeding was put in issue, relief was denied, and Joiner did not appeal. That judgment bars the present bill of review under the well-settled rule that a party is bound by an adjudication of the court's jurisdiction in a contested proceeding. RESTATEMENT OF JUDGMENTS §9 (1942).

Under this rule, a Texas court is bound by its own earlier judgment determining an issue of jurisdiction. *Farmer v. Saunders*, 128 S.W. 941, 942 (Tex. Civ. App. 1910, no writ). The rule is based on the principle that there must be an end to litigation, and when a party has had his day in court with an opportunity to present his evidence and his view of the law, there is no reason to believe that the second decision will be more satisfactory than the first. *Stoll v. Gottlieb*, 305 U.S. 165, 171-72

(1938). Moreover, judicial power includes the power to make erroneous as well as correct decisions; otherwise a judgment would always be subject to attack on its merits, and litigation would never end.

Under these well-established rules, even though the original termination decree may be void -- or, more properly, voidable -- in the sense that it was rendered without valid service of process, the judgment in the first bill of review is valid and stands as a bar to the present bill of review. No attack on the bill-of-review judgment is made here for lack of jurisdiction over either parties or subject matter in that proceeding. Obviously, if the court had granted relief setting aside the termination decree and restoring Joiner's parental rights, and no appeal had been taken, all parties would have been bound.

If the contrary determination was erroneous for any of the reasons now alleged, Joiner's remedy was to appeal. His right to attack the termination decree died with his failure to appeal from the denial of his first bill of review. See Layton v. Layton, 538 S.W.2d 642, 648 (Tex. Civ. App. - San Antonio 1976, writ ref'd n.r.e.).

Joiner insists that he should not be bound by the judgment denying his first bill of review because he has raised additional issues that were not raised in that proceeding. In particular, he asserts that the best interest of the children is the paramount consideration and their interest has never been determined. Although this argument has a strong appeal, it cannot prevail against the established rules governing the finality of judgments announced by the authorities above cited. Assertion of

additional grounds which, by the use of diligence, might have been tried in an earlier proceeding does not avoid the bar of res judicata. Rizk v. Mayad, 603 S.W.2d 733, 775-76 (Tex. 1980); Ogletree v. Crates, 363 S.W.2d 431, 435 (Tex. 1963). Otherwise a resourceful lawyer could always allege an additional ground and litigation would never end. Since in the first bill of review (or motion for new trial under rule 329) Joiner presented or had the opportunity to present all the facts challenging the jurisdiction of the court rendering the termination decree, as well as facts showing his meritorious defenses, and the court rendered an adverse judgment from which he took no appeal, the trial court properly sustained the plea of res judicata.

Neither can we accept Joiner's premise that established rules governing

finality of judgments do not apply when the interests of minor children are at issue. He argues that so long as no rights of third parties have intervened, as in the case of an adoption, the merits of the termination decree should be subject to review. We cannot agree that the principle of finality of judgments does not apply to children. Rather, it applies to them with a special force, as the supreme court has recognized.

Knowles v. Grimes, 437 S.W.2d 816, 817 (Tex. 1969); Ogletree v. Crates, 363 S.W.2d 431, 436 (Tex. 1963). The reason is stated in Ogletree, which involved an allegation that an earlier custody decree was procured by fraud. The supreme court said:

There may be a technical distinction between a suit to obtain custody and possession of a minor child through modification of a final judgment and a suit to obtain custody and possession

of the child by setting aside a final judgment, but the broad cause of action and the relief sought in both suits are the same. The suit in each instance tests the rights of the parties to custody of the child and the only pertinent inquiry is the best interests of the child. As a matter of public policy there should be a high degree of stability in the home and surroundings of a young child, and, in the absence of materially changed conditions, the disturbing influence of constant re-litigation should be discouraged. Once a final judgment of custody is rendered, a subsequent suit to modify or to avoid the judgment should be res judicata of all causes of action which, with diligence, could have been asserted in the suit as a basis for obtaining custody and possession of the child.

Joiner also argues that the trial court erred in sustaining the plea of res judicata and dismissing his bill of review at a pretrial hearing, rather than on a motion for summary judgment or trial on the merits. He relies on a line of cases which hold that since res judicata is a merit defense which must be supported by

competent evidence, rather than a dilatory plea which may be considered at pretrial under rule 166 of the Texas Rules of Civil Procedure, final disposition upon a plea of res judicata may be had only on motion for summary judgment or trial on the merits. See Kelley v. Bluff Creek Oil Co., 155 Tex. 180, 309 S.W.2d 208 (1958); Phipps v. Miller, 597 S.W.2d 458 (Tex. Civ. App. - Dallas 1980, writ ref'd n.r.e.); Piper v. Estate of Thompson, 546 S.W.2d 243 (Tex. Civ. App. - Houston 1966, no writ). We do not disagree with these authorities, but they have no application here. No further evidence was needed on the plea of res judicata because the record then before the court affirmatively showed that Joiner could not have prevailed on the merits. The conclusive bar of the judgment in the first bill of review is shown by Joiner's own pleading in the third bill of review, which

affirmatively alleges the prior proceeding. Also, the court was required to take judicial notice of its own earlier records, which have been brought forward in our present transcript. *Victory v. State*, 138 Tex. 285, 158 S.W.2d 760, 763 (1942). Since Joiner's own pleading and records within the court's judicial knowledge affirmatively show that the only question presented was a matter of law, in that no facts could have been shown in a trial on the merits that would prevent the application of the bar of *res judicata*, we hold that at the time of the pretrial hearing the case was ripe for judgment sustaining the plea of *res judicata* and denying the relief sought by the bill of review. *Ellis v. Woods*, 453 S.W.2d 509, 510 (Tex. Civ. App. - El Paso 1970, no writ); *Pan American Petroleum Corp. v. Texas Pacific Coal & Oil Co.*, 340 S.W.2d 548, 554-55 (Tex. Civ. App. - El Paso

1960, writ ref'd n.r.e.).

We need not determine whether Joiner's minor children have a right to attack the termination decree. They were represented by an appointed guardian ad litem in the original termination suit under the authority of section 11.10 TEX. FAM. CODE ANN. (Vernon Supp. 1980-81). The guardian ad litem did not appeal that decree. Neither the children nor the appointed guardian were parties to Joiner's first bill of review. In the present suit the trial court appointed a new guardian ad litem. The new guardian sought no affirmative relief on behalf of the children in the trial court and did not perfect an appeal from the trial court's dismissal of Joiner's bill of review. Before this court, the guardian ad litem has filed a brief advancing the same arguments as those presented by Joiner and urging that Joiner be given

relief by this appeal, but the guardian makes no separate claim for relief on behalf of the children. Since the children did not seek a bill of review of the termination decree by any pleading or evidence offered to the trial court in their own behalf, we limit our consideration to the rights asserted by Joiner. Consequently, this opinion should not be interpreted as holding that any relief sought on behalf of the children would be likewise barred. Neither should it be taken as implying that after a parent has failed in an attack on a termination decree, the children may maintain a separate suit attacking that decree.

Affirmed.

CLARENCE A GUITTARD
CHIEF JUSTICE

PUBLISH

: Justice Ted M. Akin dissenting.

COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

AT DALLAS

NO. 20558

WILLIAM HENRY JOINER, JR.

Appellant

VS.

MRS. KAREN H. VASQUEZ,

Appellee

FROM A DISTRICT COURT
OF DALLAS COUNTY, TEXAS

BEFORE THE COURT EN BANC
OPINION BY CHIEF JUSTICE GUITTARD

MARCH 17, 1982

ON MOTION FOR REHEARING

In this motion for rehearing Joiner
insists that the rule that a judgment
valid on its face is not void and subject

to collateral attack for lack of service does not apply to judgments against nonresidents because of due process requirements. He cites Hodges, "Collateral Attack on Judgments," 41 TEX. L. REV. 499, 505-518 (1963). Professor Hodges points out that due process may require an exception to this rule in the case of nonresidents, but he recognizes that a collateral attack may be barred by the res judicata effect of an intervening judgment. Id. at 526.

Under such an exception, the juvenile court may have erred in the first bill of review, but that error cannot avail in this third bill of review. The termination decree did not reveal on its face any lack of personal jurisdiction. Such as lack was a matter of fact and could only be established by evidence. Joiner undertook to make that proof in his first bill of review, but the court

declined to give him relief on that ground, and he failed to appeal. Although the termination decree may have been void for lack of jurisdiction over his person, the judgment in the first bill of review was not void, since he appeared and invoked the court's jurisdiction to determine whether it had jurisdiction of the termination action. The first bill of review judgment, though possibly erroneous, was valid in the jurisdictional sense, and Joiner's remedy was to appeal. Instead, he brought another bill of review on the same grounds, and, when relief was again denied, he brought a third, although he has never made any proper attack on the judgment in the first bill of review. If unsuccessful again, he may attempt a fourth, and so on, contending each time, as he does here, that no binding judgment can be rendered until he is finally heard on the merits of the original termination

action.

None of the authorities cited tend, even remotely, to support such a contention. The issue of service of process, like any other issue of fact, may be settled by a judgment in a contested proceeding under the principle stated in RESTATEMENT OF JUDGMENTS Section 9 (1941) that a party is bound by an adjudication of the court's jurisdiction in a contested proceeding. The application of this principle to nonresidents is illustrated by authorities holding that Texas courts are bound by determinations of personal jurisdiction by foreign courts in cases where Texas residents have appeared in the foreign court and contested jurisdiction. *Moody v. First National Bank of Dona Ana County*, 530 S.W2d 879, 881-82 (Tex. Civ. App. - Houston [1st Dist.] 1975, writ ref'd n.r.e), following *Dunfee v. Duke*, 375 U.S. 106 (1963). The same rule has

been applied to a jurisdictional determination by a foreign court in proceedings concerning the support and custody of children. Kellogg v. Kellogg, 559 S.W.2d 126, 128 (Tex. Civ. App. - Texarkana 1977, no writ); Layton v. Layton, 538 S.W.2d 642, 647-48 (Tex. Civ. App. - San Antonio 1976, writ ref'd n.r.e.). If a Texas court is bound by such a jurisdictional determination of a foreign court, then, on the same principle a Texas court is bound by its own determination of jurisdiction in an earlier proceeding in which the nonresident appeared and contested the jurisdiction of the Texas court.

We do not hold that a nonresident defendant is bound by the recitals of service in a judgment and cannot attack it by extrinsic evidence showing lack of proper service. We do hold that having made an attack on that ground and failed,

he may not make another.

Joiner seeks to avoid the bar of res judicata on the ground that the present proceeding is a collateral as well as a direct attack on the termination decree. He gains nothing by labeling the proceeding a collateral attack. Res judicata applies whether the earlier attack was direct or collateral. (See McGhee v. Romatka, 92 Tex. 38, 45 S.W. 552, 554 (Tex. Crim. App. 1898) (collateral attack following direct attack); Cheney v. Norton, 181 S.W.2d 835, 836 (Tex. Civ. App. - Dallas 1944, writ ref'd) (collateral attack following bill of review treated as collateral attack for want of necessary parties); "56" Petroleum Corp. v. Rodden, 98 S.W.2d 269, 270 (Tex. Civ. App. - Texarkana 1936, no writ) (direct attack following collateral attack). In McGhee v. Romatka, supra, the supreme court held that a collateral

attack in a subsequent suit for title to land was barred by the denial in the former suit of a motion for new trial alleging the same ground subsequently alleged. The court commented that if the earlier decision was erroneous, the losing party should have had it set aside.

We know of no ground for avoiding a judgment that may be urged by collateral attack but not by direct attack. When the ground for avoiding the earlier judgment is lack of service of process, the party seeking relief need not show, as in the usual bill of review, that he was prevented from making his defense to the original suit by fraud, accident, or wrongful act of the opposing party. *Texas Industries, Inc. v. Sanchez*, 525 S.W.2d 870, 871 (Tex. 1975). We need not determine whether Joinder was required in the first bill of review to prove a meritorious defense to the termination

suit because even if the court erred in requiring him to do so, he is bound by the judgment denying the bill of review, since he made no effort to set that judgment aside by appeal. *McGhee v. Romatka, supra*. Consequently, we hold that the judgment in the first bill of review is a conclusive bar to the present suit.

We are not justified in disregarding these established principles on the ground that errors in the original termination suit and in the first bill of review will have an adverse effect on the welfare of the children. If final judgments are subject to review in subsequent proceedings on issues relating to the merits, but not specifically decided in the original suit, then litigation would never end until every new theory of fact and law advanced by resourceful counsel or his successor is fully explored and expressly determined. Although

occasionally ideal justice may be more nearly attained as the result of a second trial, we must assume that in the great majority of cases the original judgment is proper and that subsequent proceedings would impose an intolerable burden of meritless litigation. The doctrine of res judicata, therefore, is not a mere rule of convenience that may be disregarded on later proof that justice was not done.

These principles apply with particular force to decrees terminating parental rights. Finality is even more important for a termination decree, which is intended to be final, than to a custody order, such as that in *Ogletree v. Crates*, 363 S.W.2d 431 (Tex. 1963), which is subject to modification. If a termination decree may be reviewed on the ground that the merits were never finally decided because the interests of the children were not properly considered, then innumerable

termination decrees would be subject to similar attacks. Although we may assume that most such attacks would fail, nevertheless, the unavailability of a plea of res judicata to cut short such attacks would cause incalculable burdens and misery for both parents and children. Consequently, we cannot be swayed by emotionally appealing arguments that such decrees fall into a special category to which the usual principles of finality of judgments do not apply. We adhere to the views stated in our original opinion.

The motion for rehearing is overruled.

CLARENCE A. GUITTARD
CHIEF JUSTICE

PUBLISH

CONCURRING: Justices Robertson, Carver,
Storey, Sparling, Vance,
Fish, Allen and Whitman

DISSENTING: Justices Akin, Stephens and
Guillot

COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS
NO. 20558

• WILLIAM HENRY JOINER, JR.

Appellant

VS.

MRS. KAREN H. VASQUEZ,

Appellee

FROM A DISTRICT COURT
OF DALLAS COUNTY, TEXAS

BEFORE THE COURT EN BANC
DISSENTING OPINION BY JUSTICE AKIN
MARCH 17, 1982

I cannot agree that res judicata, an equitable doctrine, should bar the present suit to set aside a void judgment of termination of the parental rights of the father. Neither can I agree with the

majority that, in a termination case, the policy of finality of judgments should prevail over the policy, enunciated by the legislature in the Texas Family Code, that the best interests of the children should be paramount in any suit affecting the parent-child relationship. In this respect, at no hearing have the interests of the children been considered, except at a hearing in 1980, in which the evidence showed that termination was not in the children's best interest, but the visitation order predicated on this hearing was aborted by the trial judge on the ground of res judicata. At the very least, the appeal of the children's guardian ad litem should be sustained and this cause remanded. The facts as reflected by the record indicate that an appalling miscarriage of justice has occurred and will be perpetuated unless an evidentiary hearing is had with respect to

the best interest of the children and a ruling had based on the merits. Consequently, I am compelled to dissent.

This action commenced on February 10, 1976, when Mrs. Vasquez, then Mrs. Stephens, filed a suit to terminate Joiner's¹

¹ Joiner was the first of Mrs. Vasquez' four husbands.

parental rights. Mrs. Vasquez and Joiner were divorced in Oklahoma in 1971. That court awarded custody of the couple's two children to Mrs. Vasquez, with Joiner having reasonable visitation, and ordered Joiner to pay reasonable child support. In her original petition, Mrs. Vasquez sought termination on the ground that Joiner failed to pay court-ordered child support. An attempt was made to serve citation upon Joiner in Oklahoma, where he

was a resident, but the citation was returned unexecuted on March 9, 1976. Mrs. Vasquez' counsel then filed an affidavit for citation by publication and, thereafter, service was attempted by publication. On May 18, 1976, a trial was had before the first judge,²

² The judge who presided over the original proceedings was not the present trial judge.

at which Joiner was represented by court-appointed counsel, who neither filed an answer nor otherwise actively participated at trial; the only evidence tendered was the testimony of Mrs. Vasquez and Greg Stephens, her husband at the time of the trial. Mrs. Vasquez testified that her male child by Joiner was currently in Joiner's custody because her second husband (yet another man) had taken the child from her home to Joiner & that she

believed that termination would be in the best interests of her children. Stephens testified that he had been in contact with Joiner's parents and had attempted to locate Joiner but was unable so to do. At the conclusion of the testimony, the trial judge stated that because Joiner had physical custody and was supporting his son, the court would not terminate Joiner's parental rights on the ground of nonsupport. However, no order was entered reflecting this decision. On June 2, 1976, Mrs. Vasquez amended her petition to allege that Joiner had endangered the physical and emotional well-being of the male child. No attempt was made to serve Joiner with this amended petition, nor was a hearing held or evidence presented to support termination on this ground. Indeed, the judge rendered a Decree of Termination on June 3, 1976, which found that (1) the court had jurisdiction over

the parties and subject matter and that no other court had continuing jurisdiction;

: (2) Joiner was guilty of nonsupport as to both children; (3) Joiner had placed "the child" (inferably the male child) in dangerous conditions; (4) termination was in the children's best interests; and (5) Mrs. Vasquez should be appointed as the children's managing conservator.

Thus, the trial judge rendered her decree without inquiring into the children's best interests, without inquiring into the diligence used in attempting to serve Joiner with the original petition as required by TEX. R. CIV. P. 109, without preparing a statement of evidence as required by TEX. R. CIV. P. 244 and 812, without any attempt to serve Joiner with notice of Mrs. Vasquez' trial amendment, without any findings as to the court's ground for asserting jurisdiction over Joiner, without any pleadings to

support the appointment of Mrs. Vasquez as the children's managing conservator and despite the fact that the court had previously declined to terminate Joiner's rights as to the male child on the ground of nonsupport.

On February 24, 1977, Joiner filed a petition in the trial court entitled "Motion for Bill of Review." At a hearing thereon, before Judge Penfold, the second judge involved here, Joiner presented testimony attempting to show that Mrs. Vasquez failed to use diligence in attempting to serve him with citation. Although Joiner's petition should have been considered a motion for new trial pursuant to TEX. R. CIV. P. 329, the trial judge treated it instead as a bill of review. Under rule 329, the court should have granted Joiner a new trial based upon the testimony presented, but because the trial judge mistakenly treated the

petition as a bill of review, he required Joiner to establish that he had a meritorious defense as well, upon which no evidence was presented. Thus, he denied Joiner's petition, although he found that Mrs. Vasquez had perpetrated a fraud on the court, that failing to answer was not Joiner's fault, and that no other remedy existed. Although Judge Penfold stated that this was the worst record of any termination case he had ever heard & that Mrs. Vasquez had perpetrated a fraud on the court, he incorrectly believed that he was precluded from granting relief because Joiner had not established a meritorious defense with respect to Mrs. Vasquez' amended petition in the first action. Joiner's failure to appeal this order is the grounds upon which the majority invokes the doctrine of res judicata to preclude this matter. Thus, this tragedy for these children has been perpetuated.

Joiner did not appeal the denial of his motion, but instead, under the apparent theory that the trial court had continuing jurisdiction, filed a second bill of review five days after the first bill of review was denied. On March 7, 1978, the trial court denied the second bill of review without a hearing based upon the res judicata effect of the first bill of review. No appeal was taken from this order.

Subsequent to the first two petitions designated as bills of review, Mrs. Vasquez entered into a contract with Joiner, whereby Joiner would pay her certain sums of money in exchange for permitting him regular weekend possession of the children and further that Mrs. Vasquez would consent to Joiner's adoption of his children. Pursuant to this contract, visitation was implemented by Joiner seeing the children regularly until

Mrs. Vasquez again changed her mind and severed contact between Joiner and his children before she had permitted an adoption to take place.³

³ This information was attached to a motion by Joiner to supplement the transcript, which motion was denied on September 3, 1980, by a panel of this court (including the author of the majority opinion but not the dissenter on the ground that the information was immaterial to a resolution of this case).

Thereafter, Joiner's parents filed a petition in the old termination suit, seeking grandparent visitation rights with their grandchildren and, on October 29, 1979, the trial judge signed an agreed temporary order⁴

⁴ This order was agreed to by Mrs. Vasquez and Joiner, thus tending to negate her original contention that Joiner placed

his son in "dangerous circumstances." Indeed, no evidence has ever been presented to any judge supporting this allegation.

appointing Joiner and his parents as temporary possessory conservators of the children and giving Joiner visitation rights.⁵

⁵ Apparently, Judge Penfold believed he had continuing jurisdiction of the parent-child relationship.

On February 8 and 27, 1980, the trial judge conducted a hearing to determine whether the agreed temporary orders should be extended. Although the court-appointed psychologist testified at the hearing that it would be in the best interests of the children for Joiner to have a permanent relationship with his children, the trial judge refused to extend the temporary order

on the ground of res judicata asserted by Mrs. Vasquez, who had obviously again changed her mind.

On January 3, 1980, after retaining new counsel, Joiner filed a third bill of review. Without a hearing, the trial judge again denied the petition on the ground of res judicata. From this bill of review, Joiner has now appealed to this court. Thus, from the time of the original termination proceeding in 1976 through the third bill of review, the best interest of the children was considered in only one instance, the hearing on a continuation of the agreed temporary order in 1980, at which no evidence was adduced supporting termination but instead all of the evidence showed that the best interest of the children would be served by permitting the children to visit and to continue their

relationship with their father.

Indeed, the psychologist testified that both children were emotionally disturbed by lack of association with their father and could be permanently scarred emotionally because both had been told by their mother that Joiner did not want to have anything to do with them. Consequently, both felt rejected by their father.

Extraordinarily, this situation persists although Joiner has been engaged for over six years in a vain attempt to be able to retain a parental relationship with his children.

Indeed, his efforts have been remarkable and commendable in this respect.

Unlike the majority, I cannot agree that an appellate court is impotent to act to rectify the tragedy of errors which has dogged and precluded a

consideration of the best interests of these children. Needless to say, the doctrine of res judicata should not be employed by the trial court and this court to bar a consideration of what is in the children's best interest. The question presented is actually one of policy, i.e. should the policy behind finality of judgments prevail over the policy of the Texas Family Code decreeing that where children are concerned their best interest should be the paramount concern of the court?

With respect to res judicata, we noted in *Gilbert v. Fireside Enterprises, Inc.*, 611 S.W.2d 869, 877 (Tex. Civ. App. - Dallas 1980, no writ), that the supreme court has held that where the matter had not been actually litigated, the question of whether causes of action which could have been litigated, but were not, would not invoke application of the harsh

doctrine of res judicata to bar further litigation unless compelling public policy considerations would be substantially offended by the new action before it is precluded by res judicata. Westinghouse Credit Corp. v. Knownslar, 496 S.W.2d 531, 532 (Tex. 1973). Here no compelling policy considerations are offended by reversing this denial of the bill of review and by permitting a determination on the merits of what is in the best interest of the children. To the contrary, the majority, as well as the trial court, uses the doctrine of res judicata to preclude a consideration of the best interest of the children, which in my view is untenable.

In Kownslar, the supreme court stated that, in determining whether, as a matter of policy, res judicata should apply to bar a second action, a court must look first to whether there is a Texas

case directly in point, and if not,
whether some substantial policy
consideration would be offended. Id. at
532. Here, no Texas case is directly in
point and neither is any substantial
policy consideration offended. Indeed,
the contrary is true. In the Interest of
G.M., 596 S.W.2d 846, 847 (Tex. 1980), the
supreme court, in holding that a clear and
convincing proof standard was required in
termination cases, noted that "termination
is a drastic remedy and is of such weight
and gravity" that due process required a
burden of proof greater than a
preponderance of the evidence in
involuntary termination cases. In light
of the supreme court's strong expression
with respect to the proof required in an
involuntary termination case, I cannot
believe that the supreme court would
endorse application of the doctrine of res
judicata to preclude a full hearing to

determine the best interest of children in a termination case, especially in a case such as this where no evidence to support the termination decree has ever been adduced.

Neither does the supreme court decision on Ogletree v. Crates, 363 S.W.2d 431 (Tex. 1963), relied upon by the majority, support their decision. Ogletree concerned custody of children rather than termination of parental rights. Different considerations are applicable to a termination case where the judgment of the court, even though erroneous, is final, as opposed to a custody dispute where the order of the court is subject to further review by the trial court at a later date based upon changed conditions as to the children. In a custody case, if a mistake is made with respect to the best interest of children, the trial court has continuing

jurisdiction to rectify that mistake if the circumstances of the children so justify. On the contrary, in a termination case, such as here, the judgment is final for eternity, even though the children may suffer in the sole custody of their mother, in addition to being deprived of a relationship with their father. Indeed, if her circumstances continue as shown here, the children may need the intervention of their father, which would be precluded by the majority's decision. See Durham v. Barrow, 600 S.W.2d 756 (Tex. 1980). Consequently, Ogletree is not precedent to support the conclusion of the majority, which if left to stand, precludes forever the relationship between a father and his children, which a court appointed expert concluded was not in the children's best interest. Indeed, Ogletree is inapposite to the majority's holding because that

court considered the best interest of the children in determining, as a matter of policy, to utilize res judicata to preclude further custody litigation at that time.

Moreover, we have held in C__ v C__ 534 S.W.2d 359 (Tex. Civ. App. - Dallas 1976, no writ) that the best interest of children is the primary concern of the court and that the ordinary procedural rules restricting the granting of a new trial should not be strictly adhered to by the trial court where the best interest of children is concerned. Likewise, the rationale of C__ v. C__ should apply here and we should hold that the best interest of children should not be precluded by the policy behind finality of judgments, especially in a termination suit such as here.

Furthermore, the majority refuses to consider the merits of the minor

children's attack on the termination
decree because the children's guardian ad
litem did not seek a bill of review by
pleading in the trial court and did not
appeal the dismissal of Joiner's third
bill of review. The majority concludes
that because the guardian ad litem sought
no affirmative relief in the trial court,
the children are precluded forever from
relief, apart from their father, in this
court. With this I cannot agree.

The primary purpose in appointing a
guardian ad litem is to insure that the
interests of the minor children are
protected. In the trial court, the
guardian ad litem did not need to join in
Joiner's pleading nor offer any evidence
because the trial judge had the entire
record of all the prior proceedings before
him, as well as Joiner's contentions in
which the children now join on appeal.
All of Joiner's contentions on this appeal

have been considered by the trial judge in the various hearings. In none of these proceedings was the best interest of the children considered, except in a hearing in 1980 in which the interest of the children was considered, and where the evidence showed that Joiner's parental rights should not be terminated. Under the rationale of C__ v. C__, this evidence was so compelling so as to require the trial judge to hold a full evidentiary hearing, with all parties present, to present, and to consider, evidence on what was in the best interest of the children and to make a decision ~~on the children's~~ best interests on that evidence.

Likewise, under the rationale of C__ v. C__, this court should consider the merits of the children's claim apart from Joiner's parental rights, because the children are the real parties in interest. The guardian ad litem has joined Joiner in

seeking a new trial so that the best interest of the children can be determined, which should be the primary concern of this court, as well as of the trial court. The law requires a court to consider the best interest of the children in a termination case and a guardian ad litem is appointed to insure that those interests are in fact protected. The majority's position precludes us from considering the guardian ad litem's appeal in behalf of the children because, although presented to the trial judge by Joiner, the guardian did not adopt Joiner's pleadings in the trial court. With this I cannot agree because the guardian ad litem is charged with protecting the children's interests, both in the trial court and in this court. The majority is again using a technical procedural rule, of doubtful application in this termination suit, to preclude a

hearing of that which is in the children's best interest.

Neither can I agree with the majority's assertion that their opinion does not bar forever the children's rights because a guardian ad litem's representation is limited to matters related to the suit for which he was appointed. *Durham v. Barrow*, 600 S.W.2d 756, 761 (Tex. 1980). Just as *Joiner*, the guardian appointed here would be barred by res judicata to bring another bill of review on behalf of the children under the majority's rationale. Likewise, *Joiner* would lack standing to bring a bill of review, as next friend of the children, because his parental rights have been terminated. *Id.* at 760. Thus, under the majority's holding, the judiciary is forever rendered impotent to rectify this travesty of justice for these children. Small wonder that the judiciary has been

held up to ridicule by laymen.

Faced with the plethora of judicial errors replete in this case, the majority's observation, with respect to the first and second bills of review, that "judicial power includes the power to make erroneous as well as correct decision" is small comfort to a father denied contact with his children and to the children for whom no evidentiary hearing has been had nor ruled upon by any judge with respect to what is in their best interest. Instead, the majority's rationale is but another judicial reason to frustrate the overriding public policy of determining that which is in the best interest of children in favor of procedural technicalities.

The majority places great emphasis on whether the termination decree in 1976 was void or voidable. In my view, the original decree is void for lack of

jurisdiction over Joiner, which was clearly established on the first "bill of review" hearing. Additionally, it is void because the petition upon which termination was decreed was not even attempted to be served upon Joiner even by publication. Indeed, no attempted service was had nor was a hearing had upon the amended pleading. I would suggest that, even more importantly, the judgment is void because the trial court simply lacked the jurisdictional power to render an order purporting to be in the children's best interest, when their best interest had not been considered. See Hodges, "Collateral Attacks on Judgment," 41 TEX. L. REV. 499 (1963).

Although the original decree of termination was unquestionably void, our question is whether subsequent unsuccessful attacks upon it in the trial court can impart validity to that void

decree. To support its conclusion in holding that it does, the majority relies upon the denial of the first bill of review to breathe life into a void judgment on the basis of the failure of Joiner to appeal! This conclusion is predicated upon res judicata, a species of estoppel. Estoppel, of course, is based upon equitable principles, which should not be employed to uphold a void termination judgment procured by fraud upon the trial court. See First State Bank & Trust Co. v. Overshiner, 198 S.W. 979 (Tex. Civ. App. - El Paso 1917, no writ) ("the trial court has the authority to set aside a judgment which is a nullity, notwithstanding it has been affirmed upon appeal"). See also Evans v. Young County Lumber Co., 368 S.W.2d 783, 786 (Tex. Civ. App. - Ft. Worth 1963, writ dismiss'd) (a void judgment "may be collaterally attacked in any court at any

time, including a time after appeal is perfected"). It appears to be that a void judgment in a termination suit is subject to attack at any time in any court, *Fulton v. Finch*, 162 Tex. 351, 346 S.W.2d 823, 827 (1961); *Commander v. Bryan*, 123 S.W.2d 1008 (Tex. Civ. App. - Ft. Worth 1938, no writ). See also *Ruby v. Davis*, 277 S.W. 430 (Tex. Civ. App. - Amarillo 1925, no writ), and that the equitable doctrine of *res judicata*, based on the public policy with respect to finality of judgments, should not be utilized as a reason for precluding a hearing and a ruling on whether the parental rights of Joiner should be terminated, considering the children's best interest. See *Ogletree v. Cates*, supra., see also *Gilbert v. Fireside Enterprises, Inc.*, supra.

In conclusion, I cannot join in a decision that places the policy concerning finality of judgments over the policy of

considering the best interest of children
in a termination case. Accordingly, I am
compelled to dissent in this tragedy of
judicial errors. This case cries out for
justice for these children to be
determined in a evidentiary hearing and
ruled upon by the evidence presented. My
view is particularly compelled by the
constitutional constraints placed upon
termination of parental rights by the
United States Supreme Court and the Texas
Supreme Court. Stanley v. Illinois 405
U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551
(1972); Wiley v. Spratlan, 543 S.W.2d 349
(Tex. 1976).

TED M. AKIN

JUSTICE

Publish

Concurring in Justice Akin's opinion:

Justice P. C. Guillot

COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS
NO. 20558

WILLIAM HENRY JOINER, JR.

Appellant

VS.

MRS. KAREN H. VASQUEZ,

Appellee

FROM A DISTRICT COURT
OF DALLAS COUNTY, TEXAS

BEFORE THE COURT EN BANC
DISSENTING OPINION BY JUSTICE GUILLOT
MARCH 17, 1982

While I agree with the result
reached in Justice Akin's dissent, I
believe the compelling reasons for
reversing and remanding this case are
constitutional.

At the outset this court should be cognizant of the constitutional right of family integrity. The State's severance of a parent-child relationship must receive strict judicial scrutiny. *Roe v. Conn*, 417 F. Supp. 769 (M.D. Ala. 1976).

While many of the decisions dealing with the constitutional issues raised in parent-child proceedings deal with the rights of parents, nevertheless, the reasoning in those cases applies to children as well. In *Stanley v. Illinois*, 405 U.S. 645 (1972), the United States Supreme Court held that a father had a constitutional right to a hearing before the State could take his children from him. I would hold the reverse is also true: children have a right to a hearing before one of their parents is taken from them. It is undisputed in this case that no such hearing took place.

The rights of juveniles have been

protected in delinquency hearings. In re Gault, 387 U.S. 1 (1967). Gault held that a minor is entitled to, among other things:

- (a) right to notice;
- (b) right to counsel;
- (c) right to confrontation and cross-examination; and
- (d) right to a transcript of the proceedings.

I would apply these rights to minors who are subject to losing either of their parents. Testing the record vis-a-vis Gault with respect to notice, it reflects no notice of the amended pleadings was given to the children; with respect to right to counsel, there is no evidence that the court-appointed attorney served the children's behalf between May 18, 1976, and the final motion for rehearing some four years later;¹ with respect to

¹At the first hearing the court refused to terminate.

the right to confrontation and to a transcript of the proceedings, the record reflects no hearing was ever had on the amended pleadings.

Furthermore, the failure to serve amended pleadings on the children is not only constitutionally defective, it has long been the law that if an amended pleading asserts a new cause of action, service of process is necessary. *Morrison v. Walker*, 22 Tx. 18 (1858); *Sanchez v. Texas Industries, Inc.*, 485 S.W. 2d 385 (Tex. Civ. App. - Waco 1972, writ ref. n.r.e.). There is no doubt that the real parties in interest in this case are the children. See *C. V. C.*, 534 S.W.2d 359 (Tex. Civ. App. - Dallas 1976, no writ). It necessarily follows that the amended pleadings should have been served on them.

Moreover, papers should have been served on the children because they are persons needed for just adjudication.

See Rule 39 Tex. R. Civ. P. 39.

In addition to being recognized in the federal court system, the constitutional rights of children are recognized in the State system also. See Ricketts v. Ricketts, 576 S.W.2d 932 (Ark. 1979, en banc). I would hold that the children in the present case have a constitutional right to a termination hearing at which they may adduce evidence, examine witnesses, and conduct the trial in such a manner as to assist the trier of fact to determine what is in their best interest.

PATRICK C. GUILLOT

JUSTICE

PUBLISH

Concurring in Justice Guillot's opinion:

Justices T. M. Akin and B. J. Stephens

JUDGMENT OF THE COURT OF APPEALS
OF TEXAS FOR THE FIFTH SUPREME
JUDICIAL DISTRICT
DECEMBER 11, 1981

NO. 20558

WILLIAM HENRY JOINER, JR.

Appellant

VS.

MRS. KAREN H. VASQUEZ,

Appellee

FROM A DISTRICT COURT

OF DALLAS COUNTY, TEXAS

FRIDAY, DECEMBER 11, 1981

BEFORE CHIEF JUSTICE GUITTARD AND
JUSTICES AKIN AND CARVER
OPINION BY CHIEF JUSTICE GUITTARD

This cause came on to be heard on
the transcript of the record, and the same
being inspected, because it is the opinion
of the Court that there was no error in
the judgment, it is therefore considered,

. adjudged and ordered that the judgment of
the court below be in all things affirmed;
: that the appellee Mrs. Karen H. Vasquez,
. have and recover of and from the
appellant, William Henry Joiner, Jr. and
from the cash deposit in the hands of the
District Clerk of Dallas county, Texas,
made in lieu of an appeal bond, all costs
in this behalf incurred or expended for
which execution may issue, and that this
decision be certified below for
observance.

PUBLISH

Justice Akin Dissents (opinion to follow)

ORDER OF THE COURT OF APPEALS
OF TEXAS FOR THE FIFTH SUPREME
JUDICIAL DISTRICT
OVERRULING APPELLANT'S MOTION
FOR REHEARING,
MARCH 17, 1982

NO. 20558

WILLIAM HENRY JOINER, JR.

Appellant

VS.

MRS. KAREN H. VASQUEZ,

Appellee

FROM A DISTRICT COURT
OF DALLAS COUNTY, TEXAS
WEDNESDAY, MARCH 17, 1982

BEFORE THE COURT EN BANC
OPINION BY CHIEF JUSTICE GUITTARD

This day came on to be heard
appellant's motion for rehearing in the
above cause, and the same being inspected,
it is therefore considered, adjudged and

ordered that the motion be and the same is
hereby overruled.

DISSENTING OPINION BY GUILLOT, J. WITH
AKIN, J. & STEPHENS, J. CONCURRING.

DISSENTING OPINION BY AKIN, J. WITH
GUILLOT, J. CONCURRING.

RECORD OF ORDER OF THE COURT OF APPEALS
OF TEXAS FOR THE FIFTH SUPREME
JUDICIAL DISTRICT
OVERRULING APPELLANT'S SECOND AMENDED
MOTION FOR REHEARING,
APRIL 30, 1982*

On this the 30th day of April, 1982,
the Court overruled the following
motions:

20558 William Henry Joiner, Jr. v. Mrs.
Karen H. Vasquez
APPELLANT'S SECOND AMENDED MOTION
FOR REHEARING

*The court of appeals no longer issues
separate orders overruling motions for
rehearing.

ORDER OF THE SUPREME COURT OF TEXAS
REFUSING PETITIONER'S APPLICATION FOR
WRIT OF ERROR AS PRESENTING NO
REVERSIBLE ERROR,
JANUARY 26, 1983

IN THE SUPREME COURT OF TEXAS
C-1325
WILLIAM HENRY JOINER, JR.
VS.
MRS. KAREN H. VASQUEZ,
January 26, 1983
From Dallas County Fifth District

Application of petitioner for writ of error to the Court of Appeals for the Fifth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, refused. (Justice Robertson not sitting).

It is further ordered that
applicant William Henry Joiner, Jr., pay
all costs incurred on this application.

ORDER OF THE SUPREME COURT OF TEXAS
OVERRULING PETITIONER'S MOTION
FOR REHEARING,
MARCH 9, 1983

IN THE SUPREME COURT OF TEXAS
C-1325
WILLIAM HENRY JOINER, JR.
VS.
MRS. KAREN H. VASQUEZ,
March 9, 1983
From Dallas County Fifth District

Petitioner's motion for rehearing
for application for writ of error having
been duly considered, it is ordered that
said motion be, and hereby is, overruled.
(Justice Robertson not sitting).

IN THE INTEREST OF

IN THE 304TH

REBECCA LEIGH
JOINER AND
WILLIAM BARTLEY
JOINER, Children

DISTRICT COURT
DALLAS

FIRST AMENDED PETITION FOR BILL
OF REVIEW

• COMES NOW WILLIAM HENRY JOINER, JR.

Petitioner in the above-styled and
numbered cause and files this his First
Amended Petition for Bill of Review
seeking review of a judgment previously
rendered by the Court, and in support
thereof, Petitioner would show the
Court:

I.

Respondent is KAREN H. VASQUEZ, who
resides at 2809 Robin Hill Lane, Garland,
Texas, where she may be served with
process.

II.

On February 11, 1976, Respondent
herein filed a petition seeking

termination of the parent-child relationship between Petitioner and his minor children, Rebecca Leigh Joiner and William Bartley Joiner. Said petition was filed in the Juvenile Court of Dallas County, Texas, and was entitled and numbered "In the Interest of Rebecca Leigh Joiner, William Bartley Joiner Children, No. 76-165-JUV.

III.

Citation in the above-described termination suit was not effectuated by personal service. Petitioner had no knowledge of the suit nor of hearing on May 18, 1976. Hence, Petitioner made no appearance in the termination proceeding, and no answer to the petition seeking termination was filed on Petitioner's behalf.

IV.

The original petition filed in connection with the termination of the

parent-child relationship between Petitioner and his children alleged as grounds for termination that Petitioner had failed to support the children and that termination was in the children's best interest. The cause was heard on May 18, 1976, at which time the court refused to base its termination decree as to the minor child William Bartley Joiner on the ground of nonsupport. Thereafter, Respondent filed a trial amendment on June 2, 1976, amending the grounds for termination as to Petitioner's son and alleging that the child had been placed in conditions dangerous to his physical and emotional well-being. A Decree of Termination was granted on June 3, 1976, terminating Petitioner's parental rights to both children on the ground of nonsupport, and further noted that Petitioner was being terminated as to his son on the additional ground of having

placed the child in conditions dangerous to his physical and emotional well-being, a copy of which decree is attached hereto, marked Exhibit "A", and made a part hereof by reference for all purposes.

V.

Petitioner brought a Motion for Bill of Review on February 24, 1977, which was denied by judgment of September 22, 1977. This first Motion for Bill of Review was, pursuant to Rule 329, Texas Rules of Civil Procedure, Petitioner's motion for new trial, brought within two years' from the date of entry of the Decree of Termination, a principal well-established in Texas case law.

Petitioner brought a second Motion for Bill of Review, which was denied by Order of March 7, 1978, on the basis of Respondent's Plea in Bar and Motion to Dismiss which, erroneously, relied on the

defense of res judicata. Dismissal of the second Motion for Bill of Review, was clearly judicial error.

Petitioner has never been afforded hearing on any equitable Bill of Review, and thus the Court should grant Petitioner hearing on this First Amended Petition for Bill of Review.

Petitioner would further show that the defense of res judicata is not applicable to jurisdictional questions and that this Petition can not be dismissed on those grounds.

VI.

The Decree of Termination rendered in the above-described termination suit should be declared void for the reason that this Court was without jurisdiction to render a judgment against the person of Petitioner, for the following reasons:

A. An attempt was allegedly made to

serve Petitioner, a nonresident, pursuant to Rule 108, Texas Rules of Civil Procedure, by forwarding a citation to the sheriff of Oklahoma County, Oklahoma, for personal service upon Petitioner. Subsequently, service was attempted through publication. Rule 109, Texas Rules of Civil Procedure, provides for citation by publication of an nonresident, provided "that the party applying for the citation has attempted to obtain personal service of nonresident notice as provided for in Rule 108, but has been unable to do so." Rule 108, Texas Rules of Civil Procedure, provides for citation of a nonresident, and stated that "the return of service in such cases shall be endorsed on or attached to the original notice, and shall be in the form provided in Rule 107." Rule 107, Texas Rules of Civil Procedure provides: "When the officer has not served the citation,

the return shall show the diligence used by the officer to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain." Petitioner would show the Court that the return of citation on file in cause number 76-165-JUV merely states: "William Henry Joiner, Jr. unavailable to contact", a copy of which return is attached hereto as Exhibit "B", and incorporated herein for all purposes. Clearly, this return fails to meet the requirements of Rule 107, because of its failure to show the diligence used by the officer to execute the citation. Petitioner would show the Court that the subsequent Citation by Publication is void.

Petitioner would further show the Court that, in order to sustain a judgment upon substituted service, there must be affirmative proof in the record

that the defendant was served in the manner required by law. No presumption should be indulged to aid the return in order to support the judgment.

Petitioner would show that this Court lacked in personam jurisdiction over Petitioner, and that the Decree of Termination is void and should be so declared. Petitioner requests that the Court declare the Decree of Termination entered June 3, 1976, void for want of jurisdiction.

B. The Decree of Termination should be declared void because the attorney ad litem appointed by the Court to represent Petitioner did not file any answer on behalf of Petitioner. Because no answer was filed, the Decree of Termination is a default judgment. Rule 812, Texas Rules of Civil Procedure specifically prohibits entry of default judgments in a case where service has been had by

publication.

C. The Decree of Termination should be declared void because no Statement of the Evidence was filed in the termination suit, as required by Rules 224 and 812, Texas Rules of Civil Procedure. Rule 244 provides, in part, "in every such case a statement of the evidence, approved and signed by the judge, shall be filed with the papers of the cause as a part of the record thereof."

D. The Decree of Termination should be declared void because Respondent was denied his right to due process, inasmuch as Respondent failed to use the best method possible to apprise Petitioner of the termination proceedings. Petitioner would show the Court that Respondent admitted that she was aware of the residences and whereabouts of Petitioner's parents and Petitioner's sister, and submits that citation by

substituted service would have been the method of service most likely to apprise Petitioner of the action against him.

E. The Decree of Termination should be declared void because it is constitutionally invalid, Petitioner having been denied his constitutional right to due process.

F. The Decree of Termination should be declared void because Section 11.09 of the Texas Family Code is unconstitutional. Petitioner would show that Rule 116, Texas Rules of Civil Procedure requires that a citation by publication be published once a week for four consecutive weeks, and Rule 114 provides that the party being so cited shall have not less than 42 days in which to answer. Section 11.09, Texas Family Code, requires publication of citation only one time, and permits only approximately 20 days for answer.

Petitioner would show that a person being cited in a judicial proceeding intended to deprive such person of all his parental rights should be entitled to the minimum due process afforded respondents in other civil suits in Texas, and Section 11.09 of the Texas Family Code should be declared unconstitutional.

VII.

Pleading in the alternative, without waiving the foregoing, the Decree of Termination in the above-described case should be set aside for the reason that Petitioner's failure to appear and answer was due only to the fact that he received no notice of the suit and not any negligence on his part. Petitioner submits that where there is a duty to act there cannot be negligence by inaction. Rather, Petitioner would show the Court that he was compelled to suffer the

Decree of Termination by circumstances beyond his control, that he has not been guilty of a lack of diligence in failing to avail himself of any mean to obtain relief therefrom, and that no other remedy is available to him.

VIII.

Petitioner herein had and has a good and meritorious defense to the above-described termination suit that was not presented in the termination proceedings only because Petitioner had no notice of said proceedings and hence, made no appearance therein. Petitioner submits, by way of meritorious defense the following:

A. Petitioner did not fail to support said children in accordance with his ability during a period of one year ending within six months of the date of the filing of the Petition for Termination, upon which grounds the

Decree of Termination was predicated.

Petitioner had physical possession of the child William Bartley Joiner during the said one year period and contributed one hundred percent of this child's support.

In fact, it was the Respondent who, during the described period, failed to support the child William Bartley Joiner in accordance with her ability. The Court expressly questioned the validity of Respondent's allegation, as indicated on page thirteen of the transcript of the termination proceedings, a copy of which relevant pages of the Statement of Facts is attached herein as Exhibit "C", incorporated herein for all purposes.

B. Petitioner did not place the child, William Bartley Joiner, in conditions which endangered the child's physical or emotional well-being. Rather, the facts would show that while in the possession of Petitioner, the

child's physical and emotional well-being were extended proper attention and care, and that the child was taken into the possession of Petitioner only on order to protect the child from the neglect of Respondent. Petitioner would further show that there was never any testimony adduced to support this allegation, or to support the judgment based on this allegation. Petitioner submits that Respondent could not and did not, in good faith, file both her affidavit that she had no knowledge of Petitioner's whereabouts and her trial amendment alleging that she had actual knowledge that Petitioner had placed the child in conditions which endangered the child's physical or emotional well-being.

C. No statement of the Evidence adduced at trial was prepared, approved by the Judge, or filed in the termination proceedings.

D. The Court erred in failing to meet its burden to inquire diligently into the efforts made to locate and apprise Petitioner of the proceeding against him. In fact, the record of the hearing, attached hereto as Exhibit "C", shows that the Court failed to make any inquiry whatsoever.

E. No answer or appearance was made on behalf of Petitioner.

F. Petitioner had ineffective assistance of counsel. Petitioner would show that his court-appointed counsel failed to assist and represent him effectively in the following particulars:

(1) He failed to file an answer for Petitioner;

(2) He failed to detect the fatal error made in the attempt to effect personal service on the Petitioner as a nonresident;

(3) He failed to attempt to locate

Petitioner when he could easily have done so by contacting Petitioner's parents or Petitioner's sister.

(4) He failed to make any examination of Respondent, at hearing, as to Respondent's efforts to locate Petitioner;

(5) He failed to make examination of Respondent, at hearing as to Respondent's proof of the allegations made against Petitioner in her Petition for Termination;

(6) He failed to request the filing of a Statement of Evidence prior to entry of the Decree of Termination;

(7) He failed to object to entry of the Decree of Termination terminating Respondent as to William Bartley Joiner on the grounds of failure to support, when the Court had advised counsel that the Court would not terminate on the grounds of failure to support, when the

Court had advised counsel that the Court would not terminate on that ground;

(8) He failed to object to entry of the Decree of Termination terminating Respondent as to William Bartley Joiner on the grounds of placing the child in conditions which endangered the child, when no evidence supporting that allegation was presented. Petitioner would show the Court that court-appointed attorneys serving as ad litem for a party have a duty to perform as effectively as in other cases, and that Petitioner's court-appointed attorney totally failed to provide him with effective representation.

G. The best interest of the children must be the primary consideration of the Court, and that the best interest of the children the subject of this suit is not served by an affirmance of the termination of the

parent-child relationship between
Petitioner and the children. Petitioner
submits that the Agreed Temporary Orders
entered by this Court on October 1, 1979,
in Cause No. 76-165-W are manifest
acknowledgment by this Court, by the
guardian ad litem for the minor children,
and by the parties themselves that the
relationship between Petitioner and his
children should not be terminated,
because such termination is not in the
best interest of the children.

IX.

The fact that the attempt to serve
citation upon Petitioner as a nonresident
was not in compliance with the Texas
Rules of Civil Procedure obviates the
necessity of Petitioner's having to plead
and prove that Petitioner was prevented
from presenting his meritorious defenses
by fraud, accident, or wrongful act of
Respondent in order to obtain the bill of

review setting aside the decree of termination.

Additionally, the fact that the Decree of Termination states as a ground for the termination the Petitioner's alleged failure to support his children, in clear contradiction to the express findings of the Court, constitutes judicial error and thus a circumstances that obviates the necessity of pleading and proving accident, fraud, or wrongful act of Respondent.

Petitioner would further show that Respondent's subsequent entering into an adoption contract with Petitioner, wherein she agreed to let Petitioner adopt the children the subject of this suit, after payment of certain sums of money to Respondent, misled Petitioner into not pursuing further legal remedies until it became apparent that Respondent intended to breach the contract.

WHEREFORE, PREMISES CONSIDERED,

Petitioner prays that Respondent be cited to answer and appear for hearing on this Bill of Review.

Petitioner prays that the Bill of Review be granted and that the Decree of Termination be vacated and held for naught.

Alternatively, Petitioner prays that the Bill of Review be granted, that the Decree of Termination be set aside and that a new trial be ordered in the matter of Respondent's petition for termination.

Petitioner prays that the Court find that this Court was without jurisdiction to enter its Decree of Termination, that said Decree of Termination be vacated, set aside and held for naught.

Petitioner prays the Court enter its order restoring Petitioner's parental rights and obligations in and unto his

minor children, the subject of this
suit.

Petitioner prays for costs of suit
and for such further relief, at law or in
equity, as the Court may deem proper.

• Respectfully submitted,

ROBERTSON & WILKINSON, INC.

By: /s/ Charles H. Robertson
Charles H. Robertson
3016 LTV Tower
Dallas, Texas 75201
214/748-9211

CERTIFICATE OF SERVICE

This is to certify that a true and
correct copy of the foregoing was mailed
to Mr. Steven Condos, attorney for
Respondent, and Mr. Louis Davis, attorney
ad litem, on this the 21st day of March,
1980.

/s/ Charles H. Robertson
Charles H. Robertson

NO. 80-7-W

IN THE INTEREST OF	IN THE 304TH
REBECCA LEIGH	
JOINER AND	DISTRICT COURT
WILLIAM BARTLEY	
JOINER, Children	DALLAS

PLEA IN BAR AND
MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now KAREN STEPHENS VASQUEZ,
Respondent herein, and files this Plea in
Bar and Motion to Dismiss and in support
thereof would respectfully show the Court
as follows:

I.

On February 24, 1977, Petitioner
filed his Motion for Bill of Review in
Cause No. 77-161-JUV in the Juvenile
Court of Dallas County, Texas, which
Court is now designated as the 304th
Judicial District Court of Dallas County,
Texas. On September 22, 1977, the Final
Judgment on Bill of Review in the afore-
said cause was signed by the Honorable

Craig Penfold.

II.

On September 27, 1977, Petitioner filed a Motion for Bill of Review in Cause No. 77-855-W, in the 304th Judicial District Court of Dallas County, Texas. On March 7, 1978, the Honorable Craig Penfold signed an Order granting Respondent's Plea in Bar and Motion to Dismiss Petitioner's Motion for Bill of Review.

III.

The pleading filed herein which is designated Petition for Bill of Review involves the same parties, the same issues and the same cause of action as were involved in Cause No. 77-161-JUV and Cause No. 77-855-W. Accordingly, the Judgment in the former cause and the Order in the latter cause are bars to this action and Respondent relies on the defense of res judicata.

IV.

Further, Petitioner in this action fails to plead or prove that he was prevented from presenting a meritorious defense by fraud, accident or wrongful act of Respondent. Therefore, the Petition for Bill of Review should be dismissed for failing to contain the allegations required for relief by bill of review.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that, upon hearing hereof, Petitioner's Petition for Bill of Review be dismissed with prejudice and Respondent prays for such other relief as the Court may deem just.

Respectfully submitted,

/s/ Steven G. Condos
STEVEN G. CONDOS
Attorney for Respondent
Suite 750
8350 N. Central Expressway
Dallas, Texas 75206
(214) 361-4277

NO. 80-7-W

IN THE INTEREST OF

IN THE 304TH

REBECCA LEIGH

JOINER AND

WILLIAM BARTLEY

JOINER, Children

DISTRICT COURT

DALLAS

ORDER DENYING BILL OF REVIEW

On the 27th day of March, 1980, came on to be heard Petitioner's Petition for Bill of Review in the above-entitled and numbered cause.

Petitioner, WILLIAM HENRY JOINER, JR., appeared by attorney and announced ready.

Respondent, KAREN H. VASQUEZ, appeared by attorney and announced ready.

Also appearing was LOUIS DAVIS, JR., appointed by the Court as guardian ad litem of the children the subject of this suit.

The Court after listening to the arguments of counsel finds that Petitioner's Petition for Bill of Review

should be denied as a matter of law, and

IT IS THEREFORE, ORDERED, ADJUDGED
AND DECREED that Petitioner's Petition
for Bill of Review be and the same is
hereby denied as a matter of law.

SIGNED THIS 14th day of April, A.D.,
1980.

/s/- Craig Penfold
JUDGE

NO. 80-7-W

IN THE INTEREST OF

IN THE 304TH

REBECCA LEIGH

JOINER AND

WILLIAM BARTLEY

JOINER, Children

DISTRICT COURT

DALLAS

MOTION FOR REHEARING

COMES NOW WILLIAM HENRY JOINER, JR.,
Petitioner in the above-styled and
numbered cause and files this his Motion
for Rehearing of his First Amended
Petition for Bill of Review and would
show the Court:

I.

The Court rendered judgment
overruling Petitioner's First Amended
Petition for Bill of Review during the
pretrial hearing on said Petition.
Petitioner was not afforded the
opportunity to make a record for the
purposes of appeal or for presenting a
bill of exceptions. Petitioner requests
the Court grant a rehearing of his First

Amended Petition for Bill of Review.

II.

Petitioner was not prepared for a full hearing at the time of the pretrial, Petitioner's chief counsel was not present at the pretrial hearing, and Petitioner was not afforded the opportunity to present any witnesses or testimony. Petitioner requests the Court grant a rehearing of his First Amended Petition for Bill of Review for these reasons.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays the Court grant the relief requested herein by granting a rehearing of his First Amended Petition for Bill of Review.

Respectfully submitted,

ROBERTSON & WILKINSON, INC.

By: /s/ Charles H. Robertson
Charles H. Robertson
3016 LTV Tower
Dallas, Texas 75201
214/748-9211

NO. 80-7-W

IN THE INTEREST OF

IN THE 304TH

REBECCA LEIGH
JOINER AND
WILLIAM BARTLEY
JOINER, Children

DISTRICT COURT

DALLAS

ORDER DENYING PETITIONER'S
MOTION FOR REHEARING

On May 13, 1980, came on to be considered Petitioner's Motion for Rehearing in the above-entitled and numbered cause. The Court, being satisfied that due notice of the filing of such motion and of the hearing thereon was given, and after considering the pleadings and arguments of counsel, is of the opinion that such motion should be denied.

IT IS THEREFORE ORDERED that Petitioner's Motion for Rehearing be and it is hereby denied.

SIGNED this 14th day of May, 1980.

/s/ Craig Penfold
JUDGE PRESIDING

EXCERPT FROM BRIEF FOR APPELLANT
(pp. 8-12, 17-20) IN THE COURT OF
APPEALS OF TEXAS FOR THE FIFTH SUPREME
JUDICIAL DISTRICT

POINT OF ERROR NUMBER ONE RESTATED

The trial court erred in granting Mrs. Vasquez' Plea in Bar and Motion to Dismiss because the termination decree was void. (Germane to Tr. 55 and Supp. Tr. 3-5)

POINT OF ERROR NUMBER TWO RESTATED

The trial court erred in concluding that Joiner is foreclosed from attacking the termination decree by virtue of prior proceedings in the trial court. (Germane to Tr. 55, Supp. Tr. 3-5, and Supp. Tr. 46-48)

ARGUMENT AND AUTHORITIES

The issues involved in this litigation relate to the substantive question of what procedural requirements are mandated by Texas and federal,

constitutional and statute law when parental rights are terminated. Inextricably intertwined with this consideration is the question of when and by what method may termination decrees, which are rendered in disregard of legal requirements, be set aside as void. This necessitates a discussion of the subject of direct and collateral attacks on domestic judgments in the context of constitutional principles.

Parental Rights of
Constitutional Dimension

The natural relationship between natural parents and their children is one of constitutional dimensions. In the Interest of G.M. et al, Children, 596 S.W.2d 846 (Tex. 1980); Wiley v. Spratlan, 543 S.W.2d 349, 352 (Tex. 1976), citing Wisconsin v. Yoder, 406 U.S. 205 (1972).

"The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children

have been deemed 'essential', Meyer v. Nebraska, 262 U.S. 390, 399 (1923), 'basic civil rights of man,' Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and '[r]ights far more previous than property rights,' May v. Anderson, 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody care, and nurture of the child resides first in the parents, whose primary function and freedom includes the preparation for obligations the state can neither supply nor hinder.' Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, *supra*, . . . the Equal Protection Clause of the Fourteenth Amendment, . . . and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496 (1965)." Stanley v. Illinois, 405 U.S. 645 (1972); In the Interest of G.M. et al, Children, *supra* at 846. (Parallel citations omitted.)

Due Process Requires Notice

As a consequence of the constitutional character of the right to rear one's children, notice and an opportunity to be heard is required by the due process clause of the Fourteenth

Amendment. Stanley v. Illinois, supra; In the Interest of K, 535 S.W.2d 168, 171-175 (Tex. 1976), cert. den. 429 U.S. 907 (1976) - dissent. In this connection, the United States Supreme Court has stated the following:

"Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Tr. Co., 399 U.S. 306, 313 (1950).

"An elementary and fundamental requirement of due process in any proceeding which is to be afforded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . Questions frequently arise as to the adequacy of a particular form of notice in a particular case . . . But as to the basic requirement of notice there can be

no doubt, where, as here,
the result of the judicial
proceeding was permanently
to deprive a legitimate
parent of all that parent-
hood implies." Amstrong v.
Manzo, 380 U.S. 545, 550
(1965).

In the Amstrong case, "[n]o notice
was given Amstrong, although the Manzos
well knew his precise whereabouts." Id at
547. Hence, it was not necessary for the
high court to consider the propriety of
citation by publication. As the following
paragraphs indicate, this is not an open
question.

Publication: Sham on Due Process

Citation by publication has been
termed a sham. Johnson, "Citation by
Publication: A Sham Upon Due Process,"
36 Tex. B.J. 205 (Mar. 1973). See also
Hemphill, C.J., in Edrington v.
Allbrooks. 21 Tex. 186, 189 (1858),
describing it as a "miserable substitute
for personal service". For many years it
has been characterized as a form of

constructive service which was not available when a personal judgment was sought against a nonresident. See McDonald, Texas Civil Practice, sec. 9.01.4 (1970); see also Sgitcovich v. Sgitcovich, 159 Tex. 398, 241 S.W.2d 142, 146 (1951); McDonald v. Mabree, 243 U.S. 90 (1917). A few cases permitted the use of publication in connection with the exercise of jurisdiction in personam over Texas domiciliaries. See Spinnler v. Armstrong, 63 S.W.2d 1071 (Tex.Civ.App.-- El Paso 1933). While taking the traditional view with respect to non-residents that publication is not available when a personal judgment is sought,* Professor McDonald advises that

*In May v. Anderson, supra, the plurality opinion of Justice Burton concludes that a parent's right to custody is a personal right "far more precious to Appellant than property rights" which cannot be affected in the absence of personal jurisdiction.

"publication alone is the least desirable form of service. Where service more calculated to impart actual notice is practicable, service by publication should be discountenanced by the court and avoided by counsel." McDonald, *supra* secs. 9.01.4, 9.21.2. The Texas Supreme Court has articulated the applicable principle in similar terms:

"To dispense with personal service, the substitute that is most likely to reach the defendant is the least that ought to be done is substantial justice is to be done." Sgitcovich v. Sgitcovich, *supra* at 147.

The same philosophy is embodied in the opinion of the San Antonio Court of Civil Appeals (per Barrow, C.J.) in Forney v. Jorrie, 511 S.W.2d 379, 384 (Tex.Civ.App.--San Antonio, 1974 ref. n.r.e.). In Forney, a bill of review was filed to set aside a judgment which rested upon citation by publication. The

evidence presented at trial reflected that the plaintiffs in the original action were in contact with the complainant's parents and former attorney at the time of the issuance of the citation by publication. The court stated that where substituted service under Rule 106 could be used, publication was not appropriate since when personal service is not used, "the substitute service that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."*

Regardless of whether the court accepts the traditional Texas view that citation by publication is not available when a personal judgment is sought against

*McDonald also suggests the use of Rule 106. McDonald, *supra* at 9.21.2, n. 44.

a nonresident, the case law indicates clearly that publication is a deficient form of service when alternatives are more "reasonably calculated, under all the circumstances" to actually impart notice of the pendency of the action. It is respectfully submitted the requirements of both Texas law and the due process clause of the United States Constitution require that the judgment of termination be set aside because Mrs. Vasquez did not use the manner of substitute service "most likely" (see Sgitcovich, supra) to serve notice upon Mr. Joiner, i.e., that Mrs. Vasquez used citation by publication when she could have utilized substitute service under Rule 106, Tex. R. Civ. P. 106. In her affidavit for citation by publication (Tr. 68), her attorney stated that at the time he requested issuance of citation by publication, he was in contact with Mr. Joiner's parents and with several of his

"old friends." Yet, no attempt was made to secure service through one of these persons, or to advise them of the pending action. Substitute service through such persons would in all reasonable probability have provided Joiner with actual notice of the termination proceedings. The method of service was a "miserable" substitute, a "sham" which resulted in what the trial judge has referred to as "probably the worse record of any termination case" (B.R., S.F. 59), and a "fraud on the court." (B.R., S.F. 61). For the foregoing reasons the termination decree should be set aside as void.

. . . .

The Trial Court Lacked Personal
Jurisdiction

It is undisputed that Mr. Joiner was a nonresident of Texas at the time that citation by publication was attempted

(T.R. 6-7). Apparently on the assumption that personal jurisdiction was not necessary, the trial court treated the proceeding as an old-style in rem action. There was neither allegation nor proof that Joiner was amenable to process issued by a Texas court.

Where a personal judgment is sought, due process requires that the defendant be given adequate notice of the suit and that he be subject to the personal jurisdiction of the court. World Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559, 564 (1980). In May v. Anderson, supra, Mr. Justice Burton's plurality opinion concluded that a parent's right to custody is a personal right which cannot be severed without jurisdiction in personam. In this connection, the United States Supreme Court has declared that a "judgment rendered in violation of due process is void in the rendering State."

World Wide Volkswagen Corp. v. Woodson,
supra at 564.

Neither the requirements of Texas law with respect to securing jurisdiction of nonresidents or the requirements imposed by the Due Process Clause of the Fourteenth Amendment were satisfied in the proceeding in which Mr. Joiner's parental rights were terminated.

Requirements of Texas Law

William H. Joiner, Jr. submits that Mrs. Vasquez' failure to allege grounds for the Texas court's assertion of jurisdiction over him, a nonresident, renders the judgment void for lack of in personam jurisdiction. A record showing of jurisdiction necessary to support a default judgment upon substituted service upon a nonresident must meet two major requirements: 1) the pleadings must allege facts which if proven would make the defendant amenable to process under a

long-arm statute; and 2) there must be evidence in the record that the defendant was, in fact, properly served as prescribed by the statute. Whitney v. L & L Realty Corp., supra at 95. In the case at bar, the record clearly shows that Mrs. Vasquez failed to allege the existence of the conditions which, under Tex. Rev. Civ. Stat. Ann., art. 2031b or Sections 3.26 or 11.051 of the Texas Family Code, are a prerequisite to the acquisition of personal jurisdiction. See McKanna v. Edgar, supra at 930; Gathers v. Walpace Co., Inc., 544 S.W.2d 169, 169-170 (Tex. Civ. App.--Beaumont 1976, ref. n.r.e.); Day Bright Lighting Div. v. Texas Metalsmith, Inc., 499 S.W.2d 336, 337 (Tex.Civ.App.--Dallas 1973, no writ); Security Savings & Loan Ass'n v. Ward, 444 S.W.2d 366, 367 (Tex.Civ.App.--El Paso 1968, no writ).

Due Process Requirements

In Shaffer v. Heitner, 433 U.S. 186 (1977), the United States Supreme Court declared that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny, "i.e, that the defendant must have "certain minimum contacts with the forum such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Shaffer v. Heitner, 433 U.S. 186 (1977). International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). In Mitchim v. Mitchim, 518 S.W.2d 362, 366 (Tex. 1975), the Texas Supreme Court said that in personam jurisdiction may be acquired over a nonresident defendant in a case of the nature of this one by extraterritorial personal service of process only if 1) the forum state has a statute authorizing jurisdiction over the person

by that process, and if 2) there have been sufficient contacts between the defendant and the forum relevant to the cause of action to satisfy "traditional notions of fair play and substantial justice."

The mere "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." World Wide Volkswagen Corp. v. Woodson, supra; Hanson v. Denckla, 357 U.S. 235, 253 (1958). Thus, in Kulko v. Superior Court, 436 U.S. 84 (1978), it was held that the mere act of sending a child to another state to live with the other parent "is not a commercial act and connotes no intent nor expectancy of receiving corresponding benefit in the State that would make fair the assertion of that State's judicial jurisdiction."

The Due Process Clause of the 14th

Amendment, therefore, acts to limit the power of a state court to render a valid personal jurisdiction against a nonresident defendant. World Wide Volkswagen Corp. v. Woodson, supra. Accord, U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760 (1977).

"Due process 'does not contemplate that a state may make a binding judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.' International Shoe Co. v. Washington, supra, at 319, . . . Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism by imposing territorial limitations on state power, may sometimes act to divest the State of its power to render a valid judgment. Hanson v. Denckla, supra, 357 U.S. at 251 . . ."

World Wide Volkswagen Corp. v. Woodson,

supra at 565-66 (emphasis supplied).

In the case at bar no basis for the exercise of jurisdiction over Mr. Joiner is alleged (Tr. 6-7). In fact, his contacts were insufficient to satisfy the requirements of the Due Process Clause. Thus, under the constitutional premises espoused in the preceding authorities, the judgment of termination is void, and the trial court erred in granting Appellee's Plea in Bar and Motion to Dismiss.

EXCERPT FROM APPELLANT'S
MOTION FOR REHEARING (pp. 2-4)
IN THE COURT OF APPEALS OF TEXAS
FOR THE FIFTH SUPREME JUDICIAL
DISTRICT

1. POINT OF ERROR TWO: The Court of Appeals erred in holding that the judgment recitals in the decree terminating the parent-child relationship between William Joiner and his children could not be varied by extrinsic evidence because judgment recitals do not impart absolute verity when a collateral attack is made by a nonresident.

2. Argument and Authorities: The majority characterizes the jurisdictional problem as one involving only "lack of proper service of process, that is to say, lack of jurisdiction of the person." After making this characterization, the majority concludes that it is not subject to collateral attack since it reveals no lack of jurisdiction on its face and recites proper service. Even when the majority opinion's characterization is

accepted, the cases cited by the majority do not compel the conclusion that a collateral attack must fail because of the judgment recitals. The general rule in Texas is that when a judgment is collaterally attacked, public policy ordinarily precludes inquiry into evidence dehors the record. Crawford v. McDonald, 88 Tex. 626, 33 S.W. 325, 328 (1895) ("Whether an exception has been ingrafted upon this rule by the decision of the Supreme Court of the United States in Pennoyer v. Neff, 95 U.S. 565, and, if so, what is the effect thereof, is foreign to this discussion.") In this connection, both the courts and commentators have recognized "subsequent cases make clear that in attack by a non-resident the lack of jurisdiction may be shown by extrinsic evidence, and that recitations in the judgment may be contradicted." Hodges, "Collateral

Attacks on Judgments, 41 Tex. L. Rev.
499, 542 (1963) (Fn. 382: Milner v.
Gatlin, 261 S.W.2d 1003 (Tex. Comm'n App.
1924 holdings improved. It is clear from
the court of appeals opinion, 211 S.W.
617, 621 (Tex. Civ. App. 1919), that
Martin v. Burns, 80 Tex. 676, 16 S.W.
1072 (1891), and other contrary cases
were before the court. The holdings of
the commission of appeals were approved
by the Supreme Court. Hicks v. Sias, 102
S.W.2d 460 (Tex. Civ. App.--Beaumont
1937, error ref'd); First Nat'l Bank v.
Alexander, 236 S.W. 229 (Tex. Civ. App. -
1921); see Bendy v. W.T. Carter & Bro.,
14 S.W.2d 813 (Tex. Comm'n App. 1929,
judgment adopted.) The reasoning behind
this exception is that Texas public
policy¹ does not override the Fourteenth

¹As discussed below, it is extremely
doubtful that Texas public policy
elevates the interest of the public in
finality above the best interest of
children. See In the Interest of G.M.,
et al, Children.

Amendment of the United States Constitution. See Hicks v. Sias, 102 S.W.2d 460, 464 (Tex. Civ. App.-- Beaumont 1937 writ ref'd); O'Boyle v. Bevil, 259 F.2d 506, 513 (5th Cir. (Tex.) 1958); cf. Armstrong v. Manzo, 380 U.S. 545 (1965). This reasoning is particularly compelling in this case because it cannot be doubted that the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment. Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Stanley v. Illinois, 405 U.S. 645 (1972). Finally, nothing in Deen v. Kirk, 508 S.W.2d 70, 72 (Tex. 1974), or McEwen v. Harrison, 162 Tex. 125, 345 S.W.2d 706, 710 (1961), provides that a collateral attack is unavailable. See Hodges, "Collateral Attacks on Judgments," Tex. L. Rev. 163, 182-183 (1962).

EXCERPT FROM APPELLANT'S SECOND
AMENDED MOTION FOR REHEARING (pp. 3-4) IN
COURT OF APPEALS OF TEXAS FOR THE FIFTH
SUPREME JUDICIAL DISTRICT

1. POINT OF ERROR TWO: The Court of Appeals erred in holding that the judgment recitals in the decree terminating the parent-child relationship between William Joiner and his children could not be varied by extrinsic evidence because judgment recitals do not impart absolute verity when a collateral attack is made by a nonresident.

2. Argument and Authorities: Prior to its opinion on rehearing the majority characterized the jurisdictional problem as one involving only "lack of proper service of process, that is to say, lack of jurisdiction of the person." After making this characterization, the majority concluded that it is not subject to

collateral attack since it reveals no lack of jurisdiction on its face and recites proper service. To the extent that the portion of the opinion on rehearing quoted above repudiates this analysis, this point of error has been rendered unnecessary.

Even when the majority opinion's characterization is accepted, the cases cited by the majority do not compel the conclusion that a collateral attack must fail because of the judgment recitals. The general rule in Texas is that when a judgment is collaterally attacked, public policy ordinarily precludes inquiry into evidence dehors the record. Crawford v. McDonald, 88 Tex. 626, 33 S.W.325, 328 (1895). ("Whether an exception has been ingrafted upon this rule by the decision of the Supreme Court of the United States in Pennoyer v. Neff, 95 U. S. 565, and, if so, what is the effect thereof, is foreign to this discussion.") In this connection,

both the courts and commentators have recognized that "subsequent cases make clear that in an attack by a nonresident the lack of jurisdiction may be shown by extrinsic evidence, and that recitations in the judgment may be contradicted." Hodges, "Collateral Attacks on Judgments," 41 Tex. L. Rev. 499, 542 (1963).

[Fn. 382: Milner v. Gatlin, 261 S. W. 1003 (Tex. Comm'n) App. 1924 holdings improved. It is clear from the court of appeals opinion, 211 S.W. 617, 621 (Tex. Civ. App. 1919), that Martin v. Burns, 80 Tex. 676, 16 S. W. 1072 (1891), and other contrary cases were before the court. The holdings of the commission of appeals were approved by the Supreme Court. Hicks v. Sias, 102 S.W.2d 460 (Tex. Civ. App. --Beaumont 1937, error ref'd); First Nat'l Bank v. Alexander, 236 S.W. 229 (Tex. Civ. App--1921); see Bendy v. W. T. Carter & Bro., 14 S.W.2d 813 (Tex. Comm'n App. 1929, judgment adopted....]

The reasoning behind this exception

is that Texas public policy¹ does not override the Fourteenth Amendment of the United Constitution. See Hicks v. Sias, 102 S.W. 2d 460, 464 (Tex. Civ. App.-- Beaumont 1937, writ ref'd); O'Boyle v. Bevil, 259 F.2d 506, 513 (5th Cir. (Tex.) 1958); cf. Armstrong v. Manzo, 380 U.S. 545 (1965). This reasoning is particularly compelling in this case because it cannot be doubted that the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment. Meyer v. Nebraska, 262 U. S. 390, 399 (1923);

¹As discussed below, it is extremely doubtful that Texas public policy elevates the interest of the public in finality above the best interest of children. See In the Interest of G.M., et al, Children, 596 S.W.2d 846 (Tex. 1980); Wiley v. Spratlan, 543 S.W.2d 349, 352 (Tex. 1976).

Stanley v. Illinois, 405 U.S. 645 (1972).
Finally, nothing in Deen v. Kirk, 508
S.W.2d 70, 72 (Tex. 1974), or McEwen v.
Harrison, 162 Tex. 125, 345 S.W.2d 706,
710 (1971), provides that a collateral
attack is unavailable. See Hodges,
"Collateral Attacks on Judgments," 41 Tex.
L. Rev. 163, 182-183 (1962).

EXCERPT FROM PETITIONER'S
APPLICATION FOR WRIT OF ERROR
(pp. 33-35) IN THE SUPREME COURT
OF TEXAS

POINT OF ERROR SIX RESTATED

The Court of Appeals erred in holding that the judgment recitals in the decree terminating the parent-child relationship between William Joiner and his children could not be varied by extrinsic evidence because judgment recitals do not impart absolute verity when a collateral attack is made by a nonresident. (Germane to Point of Error Two, Second Amended Motion for Rehearing)

ARGUMENT AND AUTHORITIES
UNDER POINT SIX

Prior to its opinion on rehearing the majority characterized the jurisdictional problem as one involving only "lack of proper service of process, that is to say, lack of jurisdiction of the person." After making this characterization, the majority concluded

that it is not subject to collateral attack since it reveals no lack of jurisdiction on its face and recites proper service. To the extent that the portion of the opinion on rehearing quoted above repudiates this analysis, this point of error has been rendered unnecessary.

Even when the majority opinion's characterization is accepted, the cases cited by the majority do not compel the conclusion that a collateral attack must fail because of the judgment recitals. The general rule in Texas is that when a judgment is collaterally attacked, public policy ordinarily precludes inquiry into evidence dehors the record. Crawford v. McDonald, 88 Tex. 626, 33 S.W. 325, 328 (1898) ("Whether an exception has been ingrafted upon this rule by the decision of the Supreme Court of the United States in Pennoyer v. Neff, 95 U.S. 565 (1878),

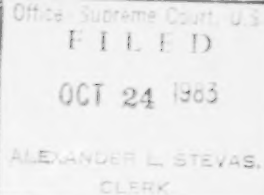
and, if so, what is the effect thereof, is foreign to this discussion.") In this connection, both the courts and commentators have recognized that "subsequent cases make clear that in an attack by a nonresident the lack of jurisdiction may be shown by extrinsic evidence, and that recitations in the judgment may be contradicted." Hodges, "Collateral Attacks on Judgments, 41 Tex. L. Rev. 499, 542 (1963).

[Fn. 382: Milner v. Gatlin, 261 S.W.2d 1003 (Tex. Comm'n App. 1924 holdings improved. It is clear from the court of appeals opinion 211 S.W.2d 617, 621 (Tex. Civ. App. 1919), that Martin v. Burns, 80 Tex. 676, 16 S.W. 1072 (1891), and other contrary cases were before the court. Hicks v. Sias, 102 S.W.2d 460 (Tex. Civ. App.--Beaumont 1937, error ref'd); First Nat'l Bank v. Alexander, 236 S.W. 229 (Tex. Civ. App.--1921); see Bendy v. W.T. Carter & Bro., 14 S.W.2d 813 (Tex. Comm'n App. 1929, judgment adopted . . .)]

The reasoning behind this exception is that Texas public policy⁶ does not override the Fourteenth Amendment of the United States Constitution. See Hicks v. Sias, 102 S.W.2d 460, 464 (Tex. Civ. App. Beaumont 1937, writ ref'd); O'Boyle v. Bevil, 259 F.2d 506, 513 (5th Cir. (Tex.) 1958; cf. Armstrong v. Manzo, 380 U.S. 545 (1965). This reasoning is particularly compelling in this case because it cannot be doubted that the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment. Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Stanley v. Illinois, 405 U.S. 645 (1972). Finally, nothing in Deen v. Kirk, 508

⁶As discussed above, it is extremely doubtful that Texas public policy elevates the interest of the public in finality above the best interest of the children. See In the Interest of G.M., et al, Children, 596 S.W.2d 846 (Tex. 1980); Wiley v. Spratlan, 543 S.W.2d 349, 352 (Tex. 1976).

S.W.2d 70, 72 (Tex. 1974), or McEwen v. Harrison, 162 Tex. 125, 345 S.W.2d 706, 710 (1961), provides that a collateral attack is unavailable. See Hodges, "Collateral Attacks on Judgments," 41 Tex. L. Rev. 163, 182-183 (1962).



NO. 82-1993

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

WILLIAM H. JOINER, JR.,
Petitioner

VS.

KAREN H. VASQUEZ,
Respondent

RESPONSE TO PETITION FOR WRIT OF
CERTIORARI TO THE COURT OF APPEALS OF
TEXAS FOR THE FIFTH SUPREME JUDICIAL DISTRICT

BRIEF FOR RESPONDENT

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ISSUES PRESENTED

- I. Did the Court of Appeals of Texas correctly deny Petitioner's Due Process claim that was based on lack of notice of his parental rights termination suit when Petitioner had proper constructive notice of said proceeding?
- II. Did the Court of Appeals of Texas correctly apply the doctrine of res judicata to bar Petitioner's subsequent Bill of Review in his parental termination suit when Petitioner was denied relief in his first Bill of Review and did not appeal?

LIST OF AUTHORITIES

<u>Armstrong v. Manzo</u> , 380 U.S. 545 (1950). . .	8
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<u>Lassiter v. Department of Social Services</u> , 452 U.S. 18 (1981)	9
<u>Leithold v. Plass</u> , 488 SW 2d 159 (Tex.Civ.App. - Houston '14th Dist.' 1972, no writ)	9
<u>Mulland v. Central Hanover Bank and Trust Co.</u> 339 U.S. 306 (1950) . . .	7
<u>Santosky v. Kramer</u> , 455 U.S. 745 (1982). .	8, 9

STATUTES AND RULES

Tex. Family Code Ann. Sec. 11.09(d), (V.A.T.S. 1982).	1, 7
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STATEMENT OF THE CASE

On February 11, 1976, Respondent, Petitioner's ex-wife filed an original petition in cause number 76-165-JUV in a Juvenile Court of Dallas County, Texas to terminate Petitioner's Parental Rights as to his children by her, Rebecca Leigh Joiner and William Bartley Joiner, (Court of Appeals opinion, P. App. A2). Personal service was attempted on Petitioner and, when the citation was returned unexecuted, notice was undertaken through publication, in accordance with Tex. Family Code Sec. 11.09(d). (R. App. A129). An attorney ad litem was appointed to represent Petitioner and a guardian ad litem was appointed to protect the interests of the children. (Court of Appeals opinion, P. App. A2). On June 3, 1976, the Juvenile Court entered a default decree terminating Petitioner's Parental Rights as to both children. (Court of Appeals opinion, P. App. A2-3). On February 24, 1977, Petitioner filed a motion for Bill of Review entitled "Motion for Bill of Review" in the same Juvenile Court of Dallas County, Texas, to set aside the Decree of Termination. (Court of

of Appeals opinion, P. App. A3). The Juvenile Court required Petitioner to establish a meritorious defense to the grounds for termination in accordance with procedures for a Bill of Review. (Court of Appeals opinion, P. App. A9).

Petitioner did not present evidence of a meritorious defense but chose only to attack the Court's jurisdiction in the Termination case. On September 22, 1977, the Juvenile Court denied Petitioner's Motion for Bill of Review. (Court of Appeals opinion, P. App. A4).

Petitioner failed to file an appeal from the denial of the motion for Bill of Review (Court of Appeals opinion, R. App. A1) and in accordance with Texas Rules of Civil Procedure, the judgment by the Juvenile Court became final. On September 27, 1977, Petitioner filed a second Bill of Review in cause number 77-855-W in a District Court of Dallas County, Texas, to set aside the decree of termination. (Court of Appeals opinion, P. App. A4). On March 7, 1978, the District Court denied Petitioner's Motion for Bill of Review upon Respondent's plea of res judicata. (Court of Appeals opinion, P. App. A4). Once again,

Petitioner failed to file an appeal from the denial of the motion for Bill of Review. (Court of Appeals opinion, P. App. A4).

On January 3, 1980, Petitioner filed a third petition for Bill of Review in cause number 80-7-W in the District Court of Dallas County, Texas, for the 304th Judicial District to set aside the Decree of Termination. (Court of Appeals opinion, P. App. A4). On March 21, 1980, Petitioner filed his First Amended Petition for Bill of Review (P. App. A73). Petitioner alleged therein that the Termination Decree was void because the Juvenile Court lacked jurisdiction over him to render the decree since he had not received adequate notice of the termination proceeding against him as required by the due process clause of the Fourteenth Amendment to the United States Constitution. (P. App. A76-84). On April 14, 1980, the District Court denied Petitioner's Petition for Bill of Review as a matter of law. (P. App. A97-98) based upon Respondent's plea for res judicata (P. App. A94-96). Petitioner filed a Motion for Rehearing (P. App. A99-100), which the District Court denied on

May 14, 1980 (P. App. A101).

Petitioner appealed to the Court of Appeals of Texas for the Fifth Supreme Judicial District. Petitioner argued on appeal that the Juvenile Court lacked jurisdiction over him to render the Termination Decree due to lack of adequate notice and had therefore violated his due process rights.

The Court of Appeals affirmed the judgment of the District Court on the ground that Petitioner's first Bill of Review was a direct attack on the Juvenile Court's Judgment on the basis of lack of jurisdiction, the Court had denied the relief sought, and Petitioner did not appeal. Consequently, Petitioner was bound by that adjudication as to the Juvenile Court's jurisdiction. The Court specifically found that Petitioner's "right to attack the Termination Decree died with his failure to appeal from the denial of his first Bill of Review." (Court of Appeals opinion P. App. A12).

The Court of Appeals concluded that imposition of the doctrine of res judicata to bar Petitioner's present Bill of Review was justified by the public policy that "there must be an end

to litigation" and that the disturbing influence of multiple lawsuits upon the environment of young children must be discouraged. (Court of Appeals opinion, P. App. A10, 13-15). On December 11, 1981, the Court of Appeals rendered judgment affirming the judgment of District Court. (P. App. A65). On March 17, 1982, the Court of Appeals overruled Petitioner's Motion for Rehearing (P. App. A67-68). On April 30, 1982, the Court of Appeals overruled Petitioner's Second Amended Motion for Rehearing (P. App. A69). Petitioner then applied for Writ of Error to the Texas Supreme Court. In his Application for Writ of Error, Petitioner attacked the judgment of the Court of Appeals on the ground that the Texas Courts had violated his due process rights. On January 29, 1983, the Supreme Court refused Petitioner's Application for Writ of Error as presenting no reversible error. (P. App. A70-71). On March 9, 1983, the Supreme Court overruled Petitioner's Motion for Rehearing. (P. App. A72).

REASONS FOR DENYING THE WRIT

- A. There is no significant question of federal constitutional law in this case.

Petitioner asserts that the termination of his parental rights involved a violation of his procedural Due Process rights under the Fourteenth Amendment to the United States Constitution. However, to show his procedural Due Process rights were violated, Petitioner must show he was not notified of the proceedings in which his rights were terminated and he was not afforded a right to be heard at a meaningful time and place. Fuentes v. Shevin, 407 U.S. 67 (1972).

In this case, an attempt was made to serve Petitioner and, when the citation was returned unexecuted, service was made by publication. (P. App. A2). Petitioner was represented by counsel appointed by the court at the subsequent hearings in this cause, and Petitioner's parental rights were terminated.

There is no attempt made by Petitioner to show that constructive service in itself is a due process violation. Furthermore, virtually all states have some form of constructive notice statutes to facilitate court action when the whereabouts of a defendant are not known. In

Mullane v. Central Hanover Bank and Trust Co.,
339 U.S. 306 (1950), this court specifically allowed notice by publication as to defendants whose whereabouts could not be ascertained.

The constructive notice given defendant was properly effected under Sec. 11.09, Texas Family Code (V.A.T.S., 1982). However, even if this Court questions the validity of the statute because the notice is only required to be published one time, there exists in Texas further procedural safeguards through which defendants deemed served by constructive notice may assert their rights. Under the Texas Rules of Procedure defendant had two years to attack the default judgment entered against him since service was by publication.

Petitioner did in fact file a motion for Bill of Review eight months after the judgment was entered in this cause, well within the statutory time period. (P. App. A2) That fact is conclusive evidence that he did have notice of the proceeding that terminated his rights, possibly not prior to the original judgment, but clearly

before he had no remedy in the Texas Courts to assert his rights. Petitioner had a hearing, at which he was present and represented by counsel, and the court denied relief because Petitioner failed to assert a meritorious defense to the grounds for termination.

At that point, Petitioner had the procedural right to appeal the trial court's decision on the merits of his bill of review. Petitioner failed to appeal and the judgment became final as to the termination of his parental rights.

Since that time, Petitioner has attempted to reassert the same legal position in two more Bills of Review and has made numerous appeals to Texas Courts. Each time the courts have denied relief based on res judicata.

In support of his arguments, Petitioner relies heavily upon this Court's holdings in Armstrong v. Manzo, 380 U.S. 545 (1950) and Santosky v. Kramer, 455 U.S. 745 (1982). These cases are easily distinguishable from the case at bar. In Armstrong, *supra*, the defendant was given no notice of the proceeding at all, even though the plaintiff knew exactly where

he was living. In Santosky, supra, the issue by this Court was the standard of evidence to be applied in a parental termination case. These cases have no application in this cause; Petitioner has not challenged the standard of evidence and he received proper notice under the correct state statute.

Petitioner also relies on Gunn v. Cavanaugh, 391 SW 2d 723 (Tex. 1965) and Leithold v. Plass, 488 SW 2d 159 (Tex. Civ. App. - Houston '14th Dist.' 1972, no writ). Both of these cases involved adoptions in which the defendant was found to have had no notice because of defective service of process. They are clearly not controlling in this cause.

Petitioner further relies on two cases that are entirely unrelated to this cause of action. In Brown v. Brown, 521 SW 2d 730 (Tex. Civ. App. - Houston '14th Dist.' 1975, no writ), the Texas Court decided that a breach of lease judgment had to be set aside upon motion for Bill of Review because movant had a statutory right to that relief. In Lassiter v. Department of Social Services, 452 U.S. 18 (1981), this Court decided the issue of right to

counsel in a parental rights termination case in favor of the state. It is unreasonable for Petitioner to rely on either of these cases since the issues in the case at bar are completely different.

Petitioner has asserted in his petition for Writ of Certiorari that the totality of these proceedings have violated his due process rights. Under the standard set forth in Fuentes, supra, Texas procedural rules have afforded Petitioner all of his procedural due process rights. Consequently, no federal question of due process rights is present in this case.

B. The doctrine of res judicata was properly applied in this case.

Petitioner also alleges that the doctrine of res judicata should not be applicable to this case because of procedural errors made by Petitioner's counsel at the Juvenile Court proceedings, because his prior counsel failed to appeal from that judgment. This Court has upheld the application of res judicata in countless domestic relations cases because the importance of finality of judgments is

so compelling. Castorr v. Brundage, 103 S. Ct. 240 (1982), denial of cert. The original petition in this cause was filed in February, 1976 (P. App. A2), and Petitioner's arguments have been asserted by him no less than six times over a period of six years. The Texas courts have dismissed Petitioner's appeals without exception based on res judicata to end this litigation and the disruptive effect it has had on the lives of the parties involved.

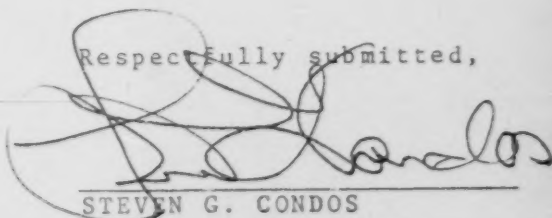
Petitioner also asserts that res judicata should not apply to this case because he says the termination decree is void. However, the Termination Decree was rendered by a juvenile court that had jurisdiction of the cause, and the decree recites proper service. It was subject to direct attack only on the basis of lack of service and by Petitioner presenting a meritorious defense. Petitioner could not show lack of service since he was properly served by publication. Additionally Petitioner failed to offer a meritorious defense to the grounds for termination of his parental rights. Consequently, Petitioner's direct attack failed and he is bound by that judgment since he

did not appeal it. Therefore, the doctrine of res judicata was properly applied to this case by the Texas Courts.

CONCLUSION

The petition for Writ of Certiorari in this cause should be denied because there is no significant question of Federal Law at issue and the doctrine of res judicata was properly applied by the lower courts.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Steven G. Condos", is written over a horizontal line.

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RESPONDENT'S APPENDIX

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APPENDIX

NOTE: Respondent would include in its Appendix Ten (10) of the Eighteen (18) listed instruments in Petitioner's Brief as set forth in the attached Table of Contents.

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Texas Family Code, Sec. 11.09(d)

Citation may be given by publication as
in other civil cases to persons entitled
to service of citation who cannot be noti-
fied by personal service or registered
mail and to persons whose names are un-
known. The notice shall be published one
time. If the name of a person entitled
to service of citation is unknown, the
notice to be published shall be addressed
to "All Whom It May Concern." One or
more causes to be heard on a certain day
may be included in one notice and hearings
may be continued from time to time
without further notice. A129